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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 3

UNITED STATES OF AMERICA, APPELLANT

v.

NORTHERN PACIFIC RAILWAY COMPANY, NORTHERN PACIFIC RAILROAD COMPANY, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR THE UNITED STATES ON REARGUMENT

OPINION BELOW

The opinion in the district court (R. 408–411) is unreported. It is a brief memorandum opinion filed September 9, 1935, adopting the reasoning and conclusions of the master contained in his first report filed May 31, 1933 (R. 262–392). No later opinion was filed.

JURISDICTION

The order of the District Court adopting the master's first report (R. 262–392) was entered on October 3, 1935 (R. 411–12), and amended on January

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29, 1936 (R. 418). Pursuant to an order of reference of April 21, 1936 (R. 420), the master filed a second report (R. 421–533). The order of the District Court disposing of the exceptions to the later report was entered on March 22, 1938 (R. 577–79). The District Court's findings of fact and conclusions of law (R. 602–38) were filed, and its decree entered, on June 27, 1939 (R. 639–47). The appeal of the United States was taken and allowed on August 21, 1939 (R. 650–58). The jurisdiction of this Court rests on the Act of May 22, 1936, c. 444, 49 Stat. 1369 (App. 156).[1]

QUESTIONS PRESENTED

The Act of June 25, 1929, among other things, directed the present litigation in order to fix the respective rights of the United States and the Northern Pacific Railway Company arising out of the land grant. The questions presented on reargument (which do not include all the questions presented on this appeal) are:

I

1. Whether the Act of June 25, 1929, insofar as it declared the company's indemnity claims forfeited to the United States, purported to declare a common-law forfeiture or amounted simply to a declaration that, because of the company's breaches,

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[1] "App." refers to the Appendix to the brief for the United States filed at the first argument. The Appendices to the present brief are lettered and will be referred to as "App. A," "App. B," and so on.

the United States was not obligated to perform further under the contract.

2. Whether the Act of June 25, 1929, required a complete accounting between the parties.

II

3. Whether in the accounting required by the Act of June 25, 1929, the defenses of acquiescence, waiver, or estoppel were available to the company.

III

4. Whether the company has so far broken its contract with the United States as to disentitle it to patents for any additional indemnity lands and to any compensation in lieu thereof. This question involves—

(a) the company's failure to complete the whole road;

(b) the company's failure to open its lands to settlement and preemption at not exceeding $2.50 an acre;

(c) the company's failure to comply with the provisions of the Joint Resolution of 1870 regarding foreclosure sales;

(d) the company's disposition of its assets; and

(e) the company's fraud in connection with the false classification of lands as mineral, out of which its claim to select indemnity lands arose.

IV

5. Whether the company must account to the United States (a) for the amounts it received for

sales of land in excess of $2.50 an acre, which it was required to sell at $2.50 an acre, and (b) for the values it derived from lands withdrawn from the public domain for its benefit without authority of law, which it would not otherwise have received.

V

If it is decided that the company, because of its own defaults, is not entitled to compensation for loss of indemnity selections, or to any patents in respect of indemnity lands, no further questions are involved on this phase of reargument. If, however, it should be held that the company is entitled to compensation, then the following additional questions arise in respect of the extent of the area for which compensation may be awarded:

6. Whether unsurveyed lands should be considered in computing, for the purpose of determining the validity of withdrawals, the amount of lands still available for indemnity selection by the company; or whether, in any event, lands subsequently surveyed, or surveyed lands subsequently restored to the public domain, should be considered.

7. Whether a withdrawal which leaves a deficiency in land available for indemnity selection by the company is totally invalid or invalid merely to the extent of the deficiency.

8. Whether, in view of its failure to complete the whole road, the company can now prove the existence of a deficiency.

9. Whether the company, without showing that it would or could have selected and obtained all of the lands upon which compensation is based, can maintain its claim to compensation for all of such lands.

STATUTES AND TREATIES INVOLVED

The relevant portions of the statutes and treaties involved are set out in the Appendix to the brief for the United States filed at the first argument. The basic statutes involved on the present argument are:

The Northern Pacific land grant Act of July 2, 1864, c. CCXVII, 13 Stat. 365 (App. 35), supplemented by the Joint Resolutions of April 10, 1869, c. 20, 16 Stat. 57 (App. 56) and May 31, 1870, c. 67, 16 Stat. 378 (App. 57).

The Amending, Forfeiture and Adjustment Act of June 25, 1929, c. 41, 46 Stat. 41 (App. 148).

STATEMENT

A. THE BASIC LAND GRANT

The Northern Pacific land grant Act of July 2, 1864 (App. 35) was one of a number of similar acts, passed between 1850 and 1871, whereby grants of public lands were made to aid in the construction of railroads.

By section 1 of that Act certain named persons were "created and erected into a body corporate and politic" to be known as the "Northern Pacific

Railroad Company." The company was authorized to locate and construct a "continuous railroad and telegraph line" beginning at a point on Lake Superior, thence running westerly by the "most eligible railroad route" north of the 45th degree of latitude to a point on Puget Sound, "with a branch, via the valley of the Columbia River, to a point at or near Portland, in the State of Oregon, leaving the main trunk line at the most suitable place, not more than three hundred miles from its western terminus." The company was vested with corporate powers necessary to carry into effect the purposes of the act. Provisions were made for the initial subscription to the corporate stock and for the organization of the company.

Section 2 granted a right-of-way.

By section 3, Congress granted to the company, "for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway," every alternate section of nonmineral public land in odd numbered sections within forty miles of each side of the railroad in the Territories through which it ran, and within twenty miles of each side of the road in the States traversed by it. The area in which such granted lands are located is known as the "primary" or "place" limits of the grant. The grant embraced public lands to which the United

States had "full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed" by the filing of a map of definite location. It was provided that whenever prior to that time any odd numbered sections within the granted limits had been "granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers," in a belt extending ten miles beyond the primary limits. This belt became known as the first indemnity limits. The grant also expressly excepted mineral lands from its operation and authorized the selection in lieu thereof of a "like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road, and within fifty miles thereof."

Since the exterior boundaries of the first indemnity limits were fixed as ten miles beyond the primary limits, in the Territories they extended fifty miles from the line of the road and were coincident with the exterior boundaries of the mineral indemnity limits. In the States, however, the fifty-mile mineral indemnity limits extended twenty miles beyond the exterior boundaries of the first indemnity limits.[2]

[2] See the map facing App., p. 2.

Lands within the primary limits which were expressly excepted from the grant, as above stated, became known as "losses" or "losses to the grant" and afforded "base" for the selection of lieu lands in the indemnity limits. The character of the lost base limited the availability of the lieu lands. Thus, non-mineral base could be used in the selection of any "other lands," while mineral base could be used only in the selection of "unoccupied and unappropriated agricultural lands."

In the administration of the grant the company was permitted to use base for the selection of lands in the first or mineral indemnity limits anywhere along the line of the road (R. 424; unprinted Narrative Statement, p. 201). In making selections the company was required to file selection lists in the local Land Office, specifically describing each tract of land selected and assigning to such selection a specific tract of land as base (unprinted Narrative Statement, p. 200). This became known as "tract for tract" selection of indemnity lands.

By section 4 of the Act provision was made for the appointment of commissioners to examine the road after each twenty-five consecutive miles were completed and to report to the President of the United States, in order that patents might be issued to the company confirming its right and title to such lands.

By section 6 it was provided that the President should cause the lands to "be surveyed for forty miles in width on both sides of the entire line of said road" after the general route had been fixed, and it was further provided that the granted lands should not be subject to sale or entry, except by the company, but that the provisions of the preemption and homestead law should apply to all other lands on the line of the road.

Section 8 recited that every grant, right, and privilege thus made to the company and accepted by it was subject to the condition that the company commence the work within two years from the approval of the Act, and complete not less than fifty miles per year after the second year and "shall construct, equip, furnish, and complete the whole road by" July 4, 1876.

Section 10 dealt with the disposition of the capital stock and the use of the granted lands as security. It required "that all people of the United States shall have the right to subscribe to the stock of the Northern Pacific Railroad Company until the whole capital named in this act of incorporation is taken up, by complying with the terms of subscription." By this section Congress also forbade the issuance by the company of any mortgage "except by the consent of Congress."

By section 11 the road was made a "post route and a military road, subject to the use of the United States," at rates to be imposed by Congress.

Section 16 authorized the directors to require payment of 10% on all subscriptions to the capital stock, the balance to be paid "on such conditions as they shall deem to be necessary to complete the said road and telegraph line within the time in this act prescribed." This section also directed that sixty days' previous notice shall be given of demands for payments on the stock, and in case any stockholder should neglect or refuse to pay in pursuance of such notice his stock was to be "forfeited absolutely to the use of the company."

By section 19 it was enacted that if the company should not obtain bona fide subscriptions to the stock to the amount of $2,000,000 with 10% paid thereon within two years after the passage of the Act, the Act would become null and void.

In section 20 Congress expressly reserved the right "at any time, having due regard for the rights of the said Northern Pacific Railroad Company," to "add to, alter, amend or repeal this act."

By subsequent resolutions (App. 53–55) the time for completion was extended to July 4, 1879 (R. 12, 22, 264).

The Resolution of April 10, 1869, c. 20, 16 Stat. 57 (App. 56), authorized an extension of the branch from at or near Portland to Puget Sound and a connection with the main line; but provided that there should be no land subsidy other than the right-of-way so authorized.

Finally, by the Joint Resolution of May 31, 1870, c. 67, 16 Stat. 378 (App. 57), the company was authorized to mortgage its franchise and all its property to aid in the construction of the road.

This resolution also changed the designation and location of the company's road. The 1864 Act had designated the line from Lake Superior to Puget Sound across the Cascade Mountains as the main line, and had authorized a branch line "via the valley of the Columbia River, to a point at or near Portland." The 1870 Resolution, on the other hand, required that the main line run "via the valley of the Columbia River" to some point on Puget Sound, and authorized the construction of a branch line "from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound." Thus the 1870 Resolution changed main line to branch, and vice versa, and authorized additionally the construction of main line between Portland and Puget Sound. This new construction was to have the "privileges, grants, and duties provided for" in the original Act.

Moreover, the Joint Resolution of 1870 authorized the establishment of a second indemnity belt ten miles wide on each side of the road beyond the limits prescribed in the charter, to be available for the satisfaction of losses which occurred in the primary limits subsequent to the passage of the Act of July 2, 1864, and prior to the date of definite location of the road. Thus a distinction was established

between losses in the primary limits which had occurred on or before July 2, 1864 (known as prior losses), and losses which occurred subsequent to that date by reason of dispositions of the public lands prior to the filing of maps of definite location (known as subsequent losses). The provisions of the Resolution limited the satisfaction of such subsequent losses in the second indemnity belt to the state in which the losses occurred. These losses, however, like the prior losses, might be satisfied in the first indemnity limits of other states. The Resolution also limited the extent to which resort might be had to the second indemnity belt in any given state to the amount of the subsequent losses occurring in that state. Moreover, the establishment of such second indemnity belt was authorized only if, when the road was finally located in any given state or territory, there were not in such state or territory the amount of lands per mile granted by Congress within the limits prescribed by the charter. In the subsequent administration of the grant of 1864 second indemnity belts were established in Wisconsin, Minnesota, Montana, and Idaho, but none were established in North Dakota or Washington (Map facing App. 2; unprinted Narrative Statement, p. 258). Under the grant of 1870 second indemnity belts were established in Washington and Oregon.[3]

[3] Whether the 1870 Joint Resolution authorized the establishment of second indemnity limits in Washington opposite the railroad between Portland and Tacoma is one

The Resolution also contained two other important provisos relating to the disposition by the company of the granted lands. The first required that all lands granted to the company which were not sold or disposed of, or which remained subject to the mortgage thereby authorized, at the expiration of five years after the completion of the entire road, should be subject to settlement and preemption like other lands at a price to be paid to the company not exceeding $2.50 per acre. The second proviso required that if the mortgage should at any time be enforced by foreclosure or other legal proceedings, or if the lands should be sold by trustees under the mortgage, either at maturity or on default, the lands should be sold at public sale at places within the states or territories in which they were located, after not less than 60 days' previous notice, in single sections or subdivisions thereof, to the highest and best bidder.

Section 2 of the Resolution reserved the right to alter or amend, having due regard to the rights of the company and any other parties.

B. ORGANIZATION AND CONSTRUCTION

The Northern Pacific Railroad Company organized as a corporation in 1864, and on December 29

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of the issues on the company's appeal. No. 4, present Term; No. 477, 1939 Term. The United States contends that these limits were not so authorized. Assignment No. 44 (R. 657); and see the brief for the United States on the first argument (hereinafter designated as "U. S. Br."), pp. 212–20.

of that year filed its acceptance of the Act with the President (R. 178).

It is alleged in the bill (R. 8-12) and admitted by the motion to dismiss (R. 154) that the incorporators and backers of the road violated the terms of the Act in the following respects: They did not secure the required amount of bona fide stock subscriptions within two years. They issued 6,000 shares to the president of the company and his associates as fully paid stock, for which in fact no payment was made. They divided the remaining stock among themselves and Jay Cooke & Company, with the result that the contemplated proceeds would not be available for construction, and the further result that ownership of the stock would be vested in a few persons instead of being open to the public generally. All this was in frustration of the purpose of the Act. Thereupon, at the instance of Jay Cooke and his associates, the enactment of the Joint Resolution of 1870, which authorized a mortgage, was obtained (R. 13, 180).

Thereafter, the company mortgaged all of its property, including the land grant, and commenced the construction of the road with the proceeds of the mortgage bonds (R. 13).

On July 30, 1870, the company filed with the Secretary of the Interior two separate maps of general route, one showing the route from a point in the State of Wisconsin to the mouth of the Walla Walla River in Washington, and the other from that point

down the valley of the Columbia River to Portland, and thence to Puget Sound (R. 50).

On February 16, 1872, the company filed an amended map of general route extending from a point in the Territory of Dakota along a different line to the mouth of the Walla Walla River, thence as in the first map, down the valley of the Columbia River to a point at or near Portland and thence northerly to Puget Sound (R. 50).

But construction had not proceeded far before the company was in financial distress. Its stock had been appropriated by its officers and promoters. The income from the small part of the road which had been built was insufficient to meet the interest on the bonds. The Panic of 1873 supervened; and the result was that the company defaulted on its bonds. Thereupon, on April 16, 1875, the trustees under the mortgage filed suit to foreclose it (R. 14).

The details of the foreclosure proceeding and the respects in which that proceeding failed, as the United States contends, to comply with the provisions of the 1870 Resolution will be discussed in the course of the argument, pp. 158–174 below, Point III (D).

At the time of the 1875 foreclosure proceedings, the company had completed about 530 miles of road, leaving some 1,732 miles to be constructed. No further construction work was done before July 4, 1879, the time fixed for the completion of the road (R. 13, 22, 264).

After 1879, construction continued until 1887. It was stop ed in the latter year and never resumed. The company built its main line from Ashland, Wisconsin, to Wallula, Washington, and from Portland, Oregon, to Tacoma, Washington; these portions were completed in 1883 (R. 269, 616). The company built a branch line between Tacoma and Pasco, Washington (Pasco being on the main line about 14 miles east of Wallula), and completed this branch in 1887 (R. 269).

The portion of the main line between Portland and Wallula, via the valley of the Columbia River, some 225 miles long, has admittedly never been completed (R. 23, 52, 191, 220). The right to earn lands opposite this unconstructed portion was forfeited by the General Forfeiture Act of September 29, 1890, c. 1040, 26 Stat. 496 (App. 78); see *United States* v. *Northern Pac. Rd. Co.*, 193 U. S. 1, 6.

In 1893, receivership proceedings were instituted against the company (R. 28). These resulted in foreclosure and reorganization, as a result of which the property of the Northern Pacific Railroad Company passed to the Northern Pacific Railway Company. These were the proceedings which gave rise to *Northern Pac. Ry. Co.* v. *Boyd*, 228 U. S. 482. The details of those proceedings material to present appeal are discussed in the course of the argument, pp. 158–174, below.

C. ADMINISTRATION OF THE GRANT IN THE INTERIOR DEPARTMENT

The Northern Pacific land grant was administered in the Interior Department, under the direction and supervision of the Secretary of the Interior. Between 1864, when the original Act was passed, and 1924, when the further issuance of land patents was suspended by Congress (Joint Resolution of June 5, 1924, c. 267, 43 Stat. 461, App. 138), the company received nearly 40,000,000 acres of public land (R. 642)—an area but little smaller than all six New England states combined.

While the basic land grant was *in praesenti*, the granted lands could not be identified until the filing of a map of definite location; until that time it was a mere float. *St. Paul & Pacific R. R. Co.* v. *Northern Pacific R. R. Co.*, 139 U. S. 1; *St. Paul & Sioux City R. R. Co.* v. *Winona & St. Peter R. R. Co.*, 112 U. S. 720, 731–33. But, upon their identification, title to lands in the place limits passed as of the date of the grant, by relation back. *Northern Lumber Co.* v. *O'Brien*, 204 U. S. 190, 196; *Southern Pac. R. R. Co.* v. *Bell*, 183 U. S. 675, 682. Thus, it will be noted, the determinative act was the filing of the map of definite location.

Actually, however, the Interior Department did not await the filing of these maps but, for the benefit of the company, withdrew from settlement and entry all lands within the primary limits upon the

filing of maps of general route (R. 72). These withdrawals were subsequently held to be unauthorized by law. *Nelson* v. *Northern Pac. Ry. Co.*, 188 U. S. 108.

Withdrawals for the benefit of the company upon the filing of maps of definite location were authorized only within the primary limits. In fact, however, extensive withdrawals of lands within the indemnity limits were also made upon the filing of maps of definite location (R. 73). This practice, however, ceased in 1887, see 6 L. D. 77, 92–93; and years later, in 1901, it was authoritatively determined that such withdrawals of indemnity lands had likewise been illegal and invalid. *Hewitt* v. *Schultz*, 180 U. S. 139.

Confirmatory patents for the place lands were to issue upon payment by the company of the cost of surveying and conveying such lands. Actually, as will be pointed out below, pp. 232–33, payment of these costs and obtaining patents was in many instances delayed to avoid payment of taxes. This practice was thwarted by the Act of July 10, 1886, c. 764, 24 Stat. 143, which removed the immunity from taxation of surveyed lands on which survey fees had not been paid.

In lieu of place lands which by reason of prior settlement, reservation, mineral status or other impediment were excepted from the grant, the company submitted tract for tract indemnity selections. Surveyed lands only were available for selection, *Northern Pac. Ry. Co.* v. *Lane*, 46 App. D. C. 434, app.

dism. *sub nom. Northern Pac. Ry. Co.* v. *Payne,* 254 U. S. 658, and title to such indemnity lands did not pass until approval of the selection. *Humbird* v. *Avery,* 195 U. S. 480, 507; *Wisconsin Central R. R. Co.* v. *Price County,* 133 U. S. 496, 511–14. First indemnity limits were laid down originally when the general route maps were filed, and again as the company filed maps of definite location. Second indemnity limits were laid down in particular states at the request of the company (R. 805). The Secretary's duty in respect of indemnity selections, as this Court has pointed out, was "to see to it that the right of selection is not abused, that claims arising out of prior settlement and the like are not disturbed, that no indemnity is given except for actual losses of the class intended, and that the lands selected are such as are subject to selection." *Payne* v. *Central Pac. Ry. Co.,* 255 U. S. 228, 236.

Several factors combined to delay the company's selection of indemnity lands. For one thing, there arose the problem of determining the mineral character *vel non* of large areas in the mountainous terrain through which the road ran. See *Barden* v. *Northern Pac. R. R. Co.,* 154 U. S. 288. This was sought to be solved by the Act of February 26, 1895, c. 131, 28 Stat. 683 (App. 95), which authorized the appointment of commissioners for the classification of such lands. Of the 11,500,000 acres of primary land purportedly examined, some 3,700,000 acres were classified as

mineral; and the bill alleges (R. 60–65) what is admitted by the motion to strike (R. 154) that no real examination was made, and that the mineral classification was procured by fraud. It is not disputed that the loss to the grant by reason of this mineral classification has already been used to obtain 1,300,000 acres of indemnity lands, or that the remainder of the loss is still pressed here as the basis for additional indemnity lands or compensation in lieu thereof.

Another reason for the delay in selection of indemnity lands, and one which persisted longer, was the circumstance that such lands, once selected, were subject to local taxation. Large areas of indemnity lands were allowed to stand, after survey, without any apparent effort on the part of the company to select them. (Gov. Exh. 95–96; unprinted Narrative Statement, p. 212.) In some instances, no attempt was made for many years to have second indemnity belts laid down. Undoubtedly the company did not care to pay taxes and other charges on lands which it might be required to hold for many years. Indeed, as this record shows (R. 753), the company in 1917 still owned nearly 6,000,000 acres of land which was unsold and apparently unsalable.

Meanwhile, Congress had adopted the policy of keeping large areas of the public lands for forest reserves. Act of March 3, 1891, c. 561, 26 Stat. 1095, 1103 (App. 89). This made it necessary to withdraw such lands from settlement and entry.

Portions of these lands were within the first and second indemnity limits as defined by the Act and Resolution, and between 1898 and 1907 some 2,600,000 acres of indemnity lands were withdrawn for forest purposes (R. 607–15).

At the time these withdrawals were made, it was believed that they were valid, and not in derogation of any rights of the company. This belief was based upon two grounds: First, because the grant to the Northern Pacific was a place grant and not a quantity grant, and hence carried no guaranty that any specific quantity of land would be received, see *Sioux City & St. Paul R. R. Co.* v. *United States*, 159 U. S. 349, 362; *United States* v. *Southern Pac. R. R. Co.*, 223 U. S. 565, 570; and, second, because this Court had consistently held that no title to indemnity lands passed to the company until approval of the company's selection lists by the Secretary of the Interior. *Osborn* v. *Froyseth*, 216 U. S. 571, 577; *Wisconsin Cent. R. R. Co.* v. *Forsythe*, 159 U. S. 46, 55; *United States* v. *Missouri K. & T. Ry. Co.*, 141 U. S. 358, 374; *Wisconsin Cent. R. R. Co.* v. *Price County*, 133 U. S. 496, 511; *Kansas Pac. R. R. Co.* v. *Atchison R. R. Co.*, 112 U. S. 414.[4]

After such forest withdrawals had been made, the company nonetheless attempted to select lands

[4] The doctrine that the company's rights vested upon the filing of the selection, and that they could not be defeated by the Secretary's rejection based upon facts or withdrawals subsequent thereto, was a later refinement. *Payne* v. *Central Pac. Ry. Co.*, 255 U. S. 228; *Santa Fe Pac. R. R. Co.* v. *Fall*, 259 U. S. 197.

included therein to satisfy claimed losses. Such selections were consistently rejected by the Interior Department (R. 430), until, as explained in the next section, a tract within the indemnity limits but within the boundary of a national forest was selected by the company, and patented to it through oversight.

D. THE FOREST RESERVE CASE

In 1904, some 5,600 acres of land within the first indemnity limits of the Northern Pacific grant in Montana were withdrawn for forest purposes, and were thereafter included, by proclamation, within the Gallatin National Forest. Meanwhile, in 1905, the company had included this tract in a selection list, and in 1909, through inadvertence and oversight, the land in question was patented to the company. Upon discovery of the mistake, the Interior Department called upon the company for a reconveyance, and, this being refused, suit was commenced to cancel the patent.

The case was tried upon an agreed stipulation of facts, and, when it came to this Court on appeal, *sub nom. United States* v. *Northern Pac. Ry. Co.*, 256 U. S. 51, it was assumed that the company had fully earned its grant, 256 U. S. at 67.

The Court held that the United States was entitled to a reconveyance only if the withdrawal was valid when made, which in turn depended on whether, at that time, the lands withdrawn were required to satisfy losses in the place limits.

While the provisions of the 1864 Act permitted settlers to acquire rights in the indemnity limits superior to the right of the company, such provisions would give no warrant for thinking that the United States would be free to reserve or appropriate to its own uses lands in the indemnity limits which were required to supply losses in the place limits. This Court then emphasized its use of the word "required" by saying that it saw no reason to doubt that lands in the indemnity limits might be so reserved or appropriated "where what remains is sufficient to satisfy all the losses."

The holding in the *Forest Reserve* case, and the rule which is laid down, are discussed at some length below, pp. 218–23, Point V (A).

As it happened, the record in the case was not adequate to enable the Court to determine whether the public lands remaining within the indemnity limits, after the Gallatin National Forest withdrawal had been made, were sufficient to make up the unsatisfied losses. Accordingly, the case was remanded to give the parties an opportunity to supplement the record, the Court pointing out that the question of determining whether any deficiency existed in the grant was primarily a task for the Interior Department.

That task, for reasons to be discussed immediately below, was never completed, with the result that no judgment was ever entered in the *Forest Reserve* case (R. 174, 511–12).

E. FROM THE FOREST RESERVE CASE THROUGH THE ACT OF 1929

After the decision of this Court in the *Forest Reserve* case in 1921, the Interior Department began the assembly of the information necessary to determine whether there had been a deficiency in the Northern Pacific grants at the respective times when the several forest withdrawals were made. The magnitude of this task can best be appreciated when it is considered that it involved an examination of land records covering more than 60,000,000 acres of public land.[8]

After the Interior Department had made a tentative adjustment, comments were submitted by the company and the Forest Service. These comments made it apparent that an accurate adjustment of the differences between the parties could not be made by computation alone, as they revealed significant underlying questions respecting the company's numerous violations of its contract which had not been disclosed by the *Forest Reserve* record, nor determined by the *Forest Reserve* decision. Accordingly, while the comments were

[8] The area in odd-numbered sections in the place limits of the 1864 grant is approximately 40,827,000 acres and in the indemnity limits approximately 17,832,000 acres (unprinted Govt. Ex. 103). In the 1870 grant there are approximately 2,189,000 acres in odd-numbered sections in place limits (exclusive of the Tacoma Overlap area) and approximately 761,000 acres in first indemnity limits (unprinted Govt. Ex. 210). It was necessary to make some examination of the records of all of these lands.

pending, President Coolidge, acting upon the joint recommendation of the Secretaries of Agriculture and Interior, referred the matter to Congress, with a view to a comprehensive review of the entire transaction, covering the mutual equities and obligations created by the Northern Pacific land grants. This recommendation was predicated upon the belief that lands had been patented to the company in excess of the acreage which it was entitled to receive, that erroneous classification of lands had resulted in excessive indemnity selections, and that the whole matter could be adequately dealt with only by Congress. For the President's letter, see Appendix A.

In consequence, Congress passed the Joint Resolution of June 5, 1924, c. 267, 43 Stat. 461 (App. 138), which directed the Secretary of the Interior to withhold his approval of the adjustment of the grants, and to withhold likewise the issuance of any further patents or muniments of title, until Congress could make a full and complete inquiry into the Northern Pacific grants to consider legislation which should meet the respective rights of the United States and the company. The Resolution provided for the appointment of a joint committee of Congress, and directed this committee "to make a thorough and complete investigation of the land grants" of the Northern Pacific companies, and "the facts and the law pertaining

thereto," and to "report to Congress its conclusions and recommendations based thereon."[6]

Hearings before the Joint Committee began in 1924 and were concluded in 1928; they cover over 5,500 printed pages.[7] At these hearings, full opportunity was accorded to all interested parties to be heard, and the witnesses presented were subjected to cross-examination. Charges of fraud, breach of contract, and errors in administration of the grants were made; many of the matters complained of were brought to light for the first time. The scope of the hearings is perhaps best shown in the Joint Committee's final report, S. Rep. 5, 71st Cong., 1st Sess. (Appendix B), submitted to Congress at the conclusion of its hearings, in support of the legislation which was then recommended. This report, together with the remarks of Mr. Colton (Appendix C) which it incorporated, are discussed at length below, pp. 64–68, 70–71.

Briefly, the report declared that the company had not complied with the conditions of the grants in a number of respects, which were enumerated; that a speedy and final adjustment of the grants was desirable; and that the decision of the courts should be obtained on all controverted questions in

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[6] Authority for the continuation of the committee and for the further suspension of adjustments by the Interior Department was conferred by successive Joint Resolutions. March 3, 1927, c. 386, 44 Stat. 1405; May 28, 1928, c. 822, 45 Stat. 789; February 16, 1929, c. 228, 45 Stat. 1221.

[7] Hereinafter referred to as J. C. R.

order to establish, fully and finally, the respective rights of the company and the United States.

The bill reported by the Joint Committee became the Act of June 25, 1929, c. 41, 46 Stat. 41 (App. 148). That Act is, by its title, an Act "to alter and amend" the granting Act and Resolution, "to declare forfeited to the United States certain claimed rights asserted by" the company, "to direct the institution and prosecution of proceedings looking to the adjustment of the grant," and for other purposes.

Section 1 retains for the United States, free of any claims, and removes from the grant, any lands within indemnity limits, which on June 5, 1924,[8] were within the exterior boundaries of any national forest or other Government reservation and which on the dates of withdrawals for governmental purposes would be or were available to the company by indemnity selection or otherwise in satisfaction of any deficiency. It provides that the company shall have such compensation, if any, as the courts hold due.

Section 2 forfeits to the United States any selection rights, if any exist, claimed by the company.

Section 3 continues the reserved right to amend and repeal and disclaims any intention to depart from the original policy "relative to the disposition of granted lands by said grantee."

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[8] The date of the Joint Resolution suspending the administration of the grants in the Interior Department and directing that a congressional investigation be had.

Section 4 excludes from the forfeiture right-of-way lands and those used in good-faith operation.

Section 5 directs the Attorney General to bring suit (1) to remove the cloud of any claims of the company, (2) to determine all controversies, (3) to have a full accounting to determine what more the company may be entitled to and what the United States may be entitled to recover, (4) to find and determine the extent of performance by the United States and by the company of the terms, conditions, and covenants expressed or implied of the granting acts, and what lands, if any, have been patented or certified as a result of fraud, mistake of law or fact, or legislative or administrative misapprehension and (5) to determine all questions of law and fact germane to a complete adjudication under the granting acts and all other questions of law and fact presented to the joint Congressional committee.

Section 6 establishes broadly the law governing the accounting to be made and provides that the court shall determine the full value of the interest which may be rightfully claimed by the company in the lands under the grants and shall determine what quantities in lands or values the company has received in excess of the full amounts it was entitled to receive, either as a result of breaches by the company of the terms, conditions, or covenants, either expressed or implied, of the granting Acts, or through mistake of law or fact, or through misapprehension as to the proper construction of the

grants, or as a result of fraud, or otherwise, and that said excess lands and values, if any, shall be charged against the company in the judgments and decrees of the court.

Section 7 confers jurisdiction on a United States District Court for some district within the states of Wisconsin, Minnesota, North Dakota, Montana, Idaho, Washington, or Oregon, and authorizes the issuance of process into any districts. This section provides for review on appeal and recites that Congress shall be given a reasonable time to enact legislation required by the final judgment.

Section 8 requires the Attorney General and the Secretaries of Interior and Agriculture to report any final determinations rendered in the proceeding and to make recommendations for the enactment of appropriate legislation.

Section 9 directs the Secretary of the Interior to withhold his approval of the adjustment of the grants and issuance of patents until the suit or suits contemplated by the Act are fully determined.

F. THE PRESENT PROCEEDING

Complying with the mandate of the 1929 Act, the Attorney General instituted the present suit in the United States District Court for Eastern Washington on July 31, 1930. The bill of complaint is long (R. 1–83) and covers many points no longer involved on this appeal; only those portions thereof which relate to questions still before this Court will be mentioned here.

Speaking generally, the bill of complaint contained appropriate allegations to quiet the title of the United States to the indemnity lands claimed by the company, and asked a complete accounting between the parties. Its essential allegations fall into two groups. First, the bill alleged fraud and breaches of contract on the part of the company disentitling the company to any further selections of indemnity lands or to any compensation in lieu thereof. Second, the bill alleged that lands had been erroneously received by the company, and moneys wrongfully obtained, all without any authority of law, for which it was obligated to account. These allegations, grouped as indicated, can be briefly summarized:

1. *Allegations of breaches of contract by the company disentitling it to recovery from the United States*

(a) The company's unsatisfied indemnity selection rights had been forfeited to the United States by the Act of June 25, 1929 (Subd. XXXVIII, R. 78).

(b) The company failed to complete the road contemplated by the Act and Resolution, because it did not construct 225 miles of road between Wallula, Washington, and Portland, Oregon (Subd. XIV, XXVI, R. 23, 52).

(c) The company violated the first proviso of the Resolution, which required that lands not sold or disposed of, or which remained subject to the mort-

gage, five years after completion of the road, should be subject to settlement and preemption at not more than $2.50 an acre, payable to the company (Subd. XIII, R. 22).

(d) The company violated, in 1875 and again in 1896, the second proviso of the Resolution, relative to the public sale, in a specified manner, of mortgaged land in the event of foreclosure (Subd. IX, XVIII, R. 13, 28).

(e) The company dissipated the assets which it received from the United States, and which were intended for use in the construction of the road—

(1) By dividing the capital stock among promoters and bankers as fully paid stock and in violation of the terms of section 10 of the Act which granted the right to subscribe to the stock to all the people of the United States (Subd. VII, VIII, R. 8, 9);

(2) By conveying 3,500,000 acres of its granted lands to holders of preferred stock to retire the same, instead of selling the lands to aid in the construction of the road (Subd. XII, R. 21); and

(3) By pledging and using the proceeds of granted lands to guarantee bonds of certain branch roads, instead of using such proceeds to construct the road contemplated by the Act and Resolution (Subd. XIV, R. 23).

(f) The company perpetrated a fraud on the United States in connection with the mineral classification made under the Act of February 26, 1895 (Subd. XXVIII, R. 60).

2. Allegations of unauthorized conveyances to the company for which it is required to account to the United States

(a) The company had sold lands in excess of $2.50 an acre, in violation of the first proviso of the Resolution, for which excess it was accountable (Subd. XIII, R. 22).

(b) The company received the benefit of withdrawals of place and indemnity lands, made without authority of law and in derogation of the rights of settlers (Subd. XXXII, R. 72).

(c) The company received large areas within the primary limits which had been excepted from the grant by its terms, having been on the date of the grant reserved by treaty for certain Indian nations (Subd. XXIX, R. 66).

(d) The company has already received approximately 1,200,000 acres of lands in the second indemnity limits of Montana in excess of what it could rightly obtain in such belt, due to error in treating as subsequent losses lands within the Crow Reservation of 1851 as diminished in 1868 (Subd. XXIX, R. 69).

(e) By reason of not having constructed its main line via the Valley of the Columbia River as required by the Resolution, the company's road across the State of Washington was on an unnecessarily circuitous route, as a result of which the company received some 1,400,000 acres to which it was not rightfully entitled (Subd. XXVI, R. 49).

The bill prayed (R. 80–82) that the court declare the company not entitled to compensation from the United States on account of any of the forest withdrawals; that it decree the company's unsatisfied indemnity selection rights to have been forfeited; that it declare a constructive trust in favor of the United States in respect of the moneys received by the company in violation of the conditions contained in the several provisos of the Resolution; that it order an accounting to the end that there be a determination of the amount of lands which the company was entitled to receive, the amount of lands it had received rightfully and otherwise, and the amount of lands or money due the United States; and that the United States be awarded judgment for the lands and money found to be due.

Answers were filed by the company and other defendants (R. 154–251, 254). These answers contained motions to strike out specific subdivisions of the bill. They also contained pleas of acquiescence, waiver, estoppel, laches and limitations which, it was claimed, prevented the United States from asserting that the company had been guilty of fraud and breaches of contract, and prevented it from asserting its claim against the company on account of lands erroneously received under the grant. The company's answer prayed for a decree in its favor for compensation under the Act of June 25, 1929 (R. 248).

The cause was referred to a special master for hearing on these demurrers and pleas prior to trial on the merits (R. 259–61). Proof was taken and argument was heard. The master filed his report on May 31, 1933 (R. 262–392), recommending that the company's motion to strike charges by the United States of fraud and breach of contract on the part of the company be sustained (R. 349), and holding that the United States had waived its right to declare the unsatisfied indemnity selection claims of the company forfeited (R. 385). The master also recommended that the subdivisions of the bill in which the United States sought to recover from the company on account of lands erroneously patented under the grant be stricken.[9] Exceptions to this report were filed by all parties (R. 393–406), and on October 3, 1935, the court overruled all exceptions, approved the master's report in full, and struck from the bill all of the foregoing allegations of fraud, breach of contract, and error in the administration of the grant (except as stated in footnote 9) (R. 411–12).[10]

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[9] Subdivision XXII (R. 41) of the bill alleging the error in administration with respect to the conflict with the Portage road, and Subdivisions XXIII, XXIV, and XXV (R. 44–49), alleging other administrative errors were not dismissed (R. 314–21). The errors charged in subdivisions XXIII, XXIV, and XXV were admitted by the company (R. 211–15). These parts of the bill are not involved in this appeal.

[10] The order of October 3, 1935, was amended by order of January 29, 1936, in a manner not materia here (R. 418).

Thereupon the cause was again referred to the master for trial upon the remaining issues presented by the pleadings. The master was directed to take proof, hear arguments of counsel, and submit his report thereon, reporting specifically as to what lands should be accounted for by the company or by the United States, leaving the amount of such compensation for later determination (R. 420).

At the trial on the merits, the proof submitted by the United States necessarily conformed to the issues as then formed. It was thus required to proceed on the assumption that the company had not been guilty of fraud or breaches of contract referred to in the stricken subdivisions, that the company's indemnity selection rights had not been forfeited, and that the claims of the United States for lands erroneously patented were not meritorious. The United States offered in evidence voluminous tabulations showing the respective areas in the primary and indemnity limits of the grants, the amount of lands received by the company in the primary limits, the amount of lands in the primary limits that had been lost to the grant, and the extent to which such losses had been satisfied in the respective indemnity belts. The situation in these respects as it existed at the end of each year, down to and including December 31, 1935, was shown (Unprinted Govt. Exhs. 82, 85, 88, 90, 93, 95, 98, 100, 206, 208). These tabulations were intended to enable the court to determine whether, at the time

any withdrawals of indemnity lands were made, sufficient public lands remained in the indemnity belt in which such withdrawals occurred to satisfy the existing unused losses compensable therein.

The company, in support of its claim for compensation on account of the withdrawn lands in question, introduced in evidence voluminous tabulations in which unused losses were assigned, tract for tract, to nearly all the withdrawn lands involved in the suit, and it claimed compensation on account of such lands (Unprinted N. P. Exhs. 144–46, 148). These tabulations were, in effect, selection lists.

The defenses of the United States against this claim, insofar as they are still involved in this appeal, were as follows:

1. That part of the lands claimed were within withdrawals which were valid under the rule in the *Forest Reserve* case;

2. That a large part of the lands were non-agricultural and therefore could not be selected on an assignment of mineral base because under the mineral indemnity proviso mineral base could be used only in the selection of agricultural lands;

3. That part of the lands were in the second indemnity belt in Montana where the company had already received more lands than it was entitled to select under the provisions of the Joint Resolution of May 31, 1870;

4. That part of the withdrawn lands were within the Northern Cheyenne Indian Reservation and therefore were not compensable under the Act of 1929;

5. That part of the lands were subject to the claims of settlers prior to June 5, 1924, on which patents were subsequently issued, and that hence the company was not entitled to compensation for such lands under the Act of 1929;

6. That part of the lands claimed were in the second indemnity belt opposite the 1870 grant in Washington, whereas the establishment of such belt was unauthorized;[11]

7. That the company had failed to prove that it would have obtained any or all of the withdrawn lands if they had not been withdrawn.

The master submitted his report on these hearings on July 26, 1937 (R. 421–533), finding a deficiency in both grants amounting to 2,792,948.34 acres (R. 523, 529). Exceptions to this report were filed by all parties (R. 538–76). The exceptions filed by the United States were sustained in part, and the exceptions filed by defendants were overruled (R. 577).

Thereupon the company submitted in evidence before the court revised tabulations similar in character to the tabulations formerly offered by it, but reducing the area of withdrawn lands for which

[11] This is one of the questions involved in the company's cross-appeal in No. 4, this Term (No. 477, 1939 Term), dealing with the so-called Tacoma overlap.

compensation was claimed (R. 778). This revision was made to eliminate from the company's claim the lands which could not be claimed under the court's ruling on exceptions to the master's second report. Additional proof was offered by the United States in defense against the revised claim of the company (R. 786).

On June 27, 1939, the court below entered its decree, finding and concluding, among other things, that the company was entitled to compensation for 1,453,061.02 acres of withdrawn lands and was entitled to patents to 428,986.68 acres of lands, 383,808.08 acres of which were primary lands and 45,178.60 acres of which were indemnity lands (R. 634, 642).

In thus holding that the company was entitled to compensation for the 1,453,061.02 acres of withdrawn lands, the court below rejected all seven contentions stated at pp. 36–37.[12] The United States duly renewed and preserved its objections to the rulings on the master's first report (R. 596–97).

Thereupon the United States appealed to this Court from the order of October 3, 1935, as amended by the order of January 29, 1936, and from the decree of June 27, 1939 (R. 658). Such appeal was taken under the provisions and pur-

[12] While the sixth contention, with respect to the establishment of second indemnity limits in Washington, was rejected below, the District Court did decide the Tacoma overlap point in favor of the United States on another ground (R. 620).

suant to the terms of the Act of May 22, 1936, *supra* (App. 156). The company cross-appealed from the decree insofar as it refused to award compensation in respect of the area within the second indemnity belt of the 1870 grant in Washington involved in the so-called Tacoma Overlap point (R. 659–62).

By order of June 3, 1940, this Court ordered a reargument of the appeal of the United States,

> limited to the purpose, scope, and effect of the Act of June 25, 1929, the relief thereby afforded the parties, and the defenses made available to them; and to appellant's assignments of errors 1–12, inc., 13 (insofar as it relates to failure to construct a line from Wallula, Washington, to Portland, Oregon), 19–27 inc., 29, 30, 32, 33, 36–40 inc., 42, 43, 52–54 inc.—particularly with reference to the bearing of the matters comprehended in these assignments upon the nature and extent of the relief accorded, and the defenses made available, to the parties respectively, by secs. 1, 2, 5, and 6 of said Act.

SPECIFICATIONS OF ERROR TO BE URGED

[The numbering refers to the original assignments of error, R. 651–58, and thus conforms to that of the order for reargument.]

The District Court erred:

1. In holding that Subdivision VII of the amended complaint alleging facts relating to the issuance by the Northern Pacific Railroad Com-

pany of 6,000 shares of its capital stock for less than the par value thereof, is insufficient in point of law upon the face thereof, and in dismissing it from the complaint [Argued as Point III (E)].

2. In holding that Subdivision VIII of the amended complaint, alleging facts relating to the issuance of the capital stock of the Northern Pacific Railroad Company without consideration and for less than the par value thereof, and without offering the same to the public, is insufficient in point of law upon the face thereof, and in dismissing it from the complaint [Argued as Point III (E)].

3. In holding that Subdivision IX of the amended complaint, alleging facts relating to the reorganization of the Northern Pacific Railroad Company in 1875, the issuance of its corporate stock without consideration and for less than the par value thereof, and the sale, under foreclosure decree, to a bondholders' committee, of certain granted lands without public sale in the State where the same were situated, is insufficient in point of law upon the face thereof, and in dismissing all of that Subdivision except the first two paragraphs thereof from the complaint [Argued as Point III (D)].

4. In holding that the plaintiff is barred, by acquiescence and waiver, from asserting the matter set forth in Subdivision IX of the amended complaint [Argued as Points II and III (D)].

5. In holding that Subdivision XII of the amended complaint, alleging facts relating to the

exchange of granted lands for preferred stock of the Northern Pacific Railroad Company, is insufficient in point of law upon the face thereof, and in dismissing it from the complaint [Argued as Point III (E)].

6. In holding that the plaintiff is barred by acquiescence and waiver from asserting the matter set forth in Subdivision XII of the amended complaint [Argued as Points II and III (E)].

7. In holding that Subdivision XIII of the amended complaint, alleging facts relating to the failure of the defendants to comply with the proviso of the Joint Resolution of May 31, 1870, 16 Stat. 378, requiring that certain lands shall be subject to settlement and preemption at a price not exceeding $2.50 per acre, is insufficient in point of law upon the face thereof, and in dismissing it from the complaint [Argued as Points III (C) and IV (A)].

8. In holding that the plaintiff is barred by acquiescence and waiver from questioning the validity of mortgages executed after the year 1875 [Argued as Points II and III (C)].

9. In holding that Subdivision XIV of the amended complaint, alleging facts relating to an alleged dissipation by the Railroad of funds received from the land grant in the construction of branch lines and consequent breach by it of the contract to build from Wallula to Portland, is insufficient in point of law upon the face thereof, and

in dismissing it from the complaint [Argued as Points III (B) and III (E)].

10. In holding that Subdivision XVIII of the amended complaint, alleging facts relating to the sale of lands within the grant, on foreclosure, pursuant to a reorganization plan of 1896 to the Northern Pacific Railway Company, rather than to third persons as required by the Joint Resolution of May 31, 1870, is insufficient in point of law upon the face thereof, and in dismissing it from the complaint [Argued as Point III (D)].

11. In holding that the plaintiff is estopped from setting up or relying on the facts set forth in Subdivision XVIII of the amended complaint [Argued as Points II and III (D)].

12. In holding that Subdivision XIX of the amended complaint, alleging facts relating to the cost of construction of the main line of the Northern Pacific Railroad Company as compared to the amounts of money and the value of other assets received by the Northern Pacific companies from the granted lands, is insufficient in point of law upon the face thereof, and in dismissing it from the complaint [Argued as Point IV (F) (1)].

13. In holding that Subdivision XXVI of the amended complaint, alleging failure of the Northern Pacific Railroad Company to construct a line from Wallula to Portland * * * is insufficient in point of law upon the face thereof, and in dismissing it from the complaint [Argued as Point III (B)].

19. In holding that Subdivision XXXII of the amended complaint, alleging facts relating to the erroneous administration of the grant through withdrawal of lands upon the filing of general route maps, and through withdrawal of lands in indemnity limits, is insufficient in point of law upon the face thereof, and in dismissing it from the complaint [Argued as Point IV (B)].

20. In holding that Subdivision XXXV alleging facts relating to the improper acquisition by the Railroad of valuable lands in lieu of less valuable land in the Mt. Rainier Forest Reserve, is insufficient in point of law upon the face thereof, and in dismissing it from the complaint [Argued as Point IV (F) (2)].

21. In holding that the plaintiff is without power or right of forfeiture, and that the forfeiture declared by section 2 of the Act of June 25, 1929, 46 Stat. 41, is void and that the United States is without power or right to declare it [Argued as Points I, II, III, and III (G)].

22. In holding that the plaintiff is barred by acquiescence and waiver from asserting or claiming the forfeiture declared by section 2 of the Act of June 25, 1929, 46 Stat. 41, and alleged in Subdivision XXXVIII of the amended bill of complaint, and in dismissing it from the complaint [Argued as Points I, II, III, and III (G)].

23. In failing to hold that by reason of the Railroad Company's failure to locate or construct its

line between Wallula, Washington, and Portland, Oregon, the United States had the right to refuse to convey further indemnity lands at the time the several withdrawals were made, and that therefore such withdrawals were and are valid [Argued as Point III (B)].

24. In failing to hold that if, as alleged in various subdivisions of the amended complaint which were dismissed by the court therefrom, the Railroad was guilty of breaches of contract, acts of fraud and illegal conduct therein alleged, the Government had the right to refuse to convey further indemnity lands at the time the several withdrawals were made, and that therefore such withdrawals were and are valid [Argued as Points III and III (G)].

25. In failing to hold that if, as alleged in various subdivisions of the amended complaint which were dismissed by the court therefrom, the Railroad was guilty of breaches of contract, acts of fraud and illegal conduct therein alleged, the Government had the right to refuse further performance when the Act of June 25, 1929, was passed and therefore the Government is under no obligation to compensate for lands withdrawn [Argued as Points III and III (G)].

26. In failing to hold that if, as alleged in various subdivisions of the amended complaint which were dismissed by the court therefrom, the Railroad was guilty of breaches of contract, acts of

fraud and illegal conduct therein alleged, the Government is under no obligation to convey any lands which are in the indemnity belts and outside the withdrawals [Argued as Points III and III (G)].

27. In holding withdrawals invalid and the Railway Company entitled to compensation on account of withdrawn lands without determining the facts alleged in Subdivision XXVIII and other subdivisions of the amended complaint which were dismissed by the court and which set forth facts showing that the Railroad has received large amounts in lands, or values, through fraud, breach of contract, and errors in the administration of the grants, and thus tender issues which the court was required by the Act of June 25, 1929, to determine [Argued as Points III and III (G)].

29. In failing to add to the court's finding (b) in Subdivision I entitled "General Findings and Conclusions," a statement and finding of fact that the time limited in the Act of July 2, 1864, as amended, for the completion of said railroad, was July 4, 1879; that on that date 530.4 miles of the contemplated road had been constructed; and that thereafter 1,507.31 miles of road were constructed; but the main line of the railroad between Wallula, Washington, and Portland, Oregon, via the Valley of the Columbia River, a distance of approximately 225 miles, was never definitely located or constructed [Argued as Point III (B)].

30. In finding that the sales of mortgaged land following the decrees of foreclosure in 1896 and

subsequent thereto were in single sections or subdivisions thereof to the highest and best bidder in accordance with the requirements of the Joint Resolution of May 31, 1870 [Argued as Point III (D)].

32. In holding that, in determining the validity of withdrawals in indemnity limits, land unsurveyed at date of withdrawal cannot be counted [Argued as Point V (B) (1)].

33. In finding those withdrawals invalid which when made left sufficient vacant lands including surveyed and unsurveyed land to satisfy proper losses of the Railroad [Argued as Point V (B) (1)].

36. In holding that a withdrawal remained invalid although at some time subsequent to the withdrawal there were more than sufficient surveyed nonmineral lands in the indemnity belt to satisfy all proper losses [Argued as Point V (B) (2)].

37. In failing to hold that the withdrawal of March 1, 1898, of 163,280 acres in the second indemnity belt in Idaho, is a valid withdrawal, except as to the difference between the amount of unused losses then properly satisfiable in that belt (30,879.76 acres) and the amount of surveyed land available for indemnity within that belt (25,500.72 acres), or as to 5,379.04 acres [Argued as Point V (B) (3)].

38. In holding that the withdrawal set forth in assignment 37 was and remained invalid although

by December 31, 1900, there were 47,513.59 acres of vacant surveyed lands in the second indemnity limits and the Railroad had only 29,857.23 acres of unused losses satisfiable in that belt, and on December 31, 1905, there were still 44,073.15 acres of vacant surveyed lands and the Railroad's unused losses satisfiable in that belt were 29,576.25 acres [Argued as Point V (B) (2)].

39. In failing to hold that withdrawals which left insufficient lands to satisfy all the losses were invalid only to the extent of the deficiency [Argued as Point V (B) (3)].

40. In holding the several withdrawals invalid notwithstanding the failure to prove or establish whether a deficiency would have existed at the dates of the withdrawals had the Wallula-Portland line been located or constructed [Argued as Point V (E) (1)].

42. In holding that the Railroad is entitled to compensation for all of the withdrawn lands to which it can now assign losses in the absence of proof as to whether the Railroad would have received all of them or any of them, or that it has received any less lands than it would have received if the withdrawals had not been made [Argued as Point V (E) (2)].

43. In holding that the Railroad is entitled to compensation for all of the withdrawn lands to which it can now assign losses, in the absence of proof that the Railroad would have received all of

said lands had such withdrawals not been made, or that any amount of such lands would in that event have been received, or that through such withdrawals the Railroad lost lands which exceeded in value or amount the lands which it improperly received through the illegal withdrawals mentioned in Subdivision XXXII of the amended complaint, and through the other errors in the administration of the grants alleged in those portions of the amended complaint which the court dismissed therefrom [Argued as Point V (E) (2)].

52. In holding that the Railroad is now entitled to receive patent to any of the indemnity lands mentioned or referred to in Subdivision XVIII of the court's findings [Argued as Points III, III (G), and V (C) (6)].

53. In holding any withdrawals by the Government in the indemnity limits invalid [Argued as Points III and III (G)].

54. In holding that the Railroad is entitled to compensation for or on account of any indemnity lands involved in the suit [Argued as Points III and III (G)].

SUMMARY OF ARGUMENT

I

A. Section 2 of the Act of June 25, 1929, which declares forfeited to the United States all of the unsatisfied indemnity selection claims of the company, was simply a declaration by Congress, one of the parties to the land-grant contract, that the com-

pany had so far and so substantially violated the terms of that contract as to forfeit any further executory rights thereunder. Section 2 did not accomplish a common-law forfeiture, it did not affect lands already conveyed, and it did not revest in the United States titles already vested in the company. This interpretation of the forfeiture provision is supported by the committee reports and by the legislative history of the Act. These show conclusively that the forfeiture was based upon the many defaults and breaches on the company's part which had been considered by the Joint Committee. There is nothing unconstitutional about such a declaration of forfeiture; there is no constitutional sanction for breaches of contract.

B. Congress intended to leave the ultimate adjustment of the parties' rights to the courts; the final determination as to whether Congress was legally justified in refusing further performance under the land-grant contract was to be a matter for judicial decision. If Congress was found to be not justified in refusing further performance, the company was to be awarded compensation.

C. The 1929 Act directed the Attorney General to institute suit against the company. In that suit Congress required a complete accounting, designed to search the record of the land-grant transactions between the United States and the company from the beginning. The Act prescribed in detail what

matters were to be considered, and what items were to be charged against each party in the accounting. A special jurisdiction was conferred on an existing court, and a special procedure was prescribed. The court was empowered to grant relief appropriate to whatever determination might ultimately be made.

D. The right to compensation conferred upon the company was a new right. Prior to the Act of 1929, there was no way for the company to compel approval of its indemnity selections, or to compel conveyances of indemnity lands theretofore selected, or to obtain compensation in lieu thereof. This is not disputed. The new right conferred by the 1929 Act was created as an incident of the Congressional power to alter and amend the granting Act and Resolution, and not as an exercise of the power of eminent domain. Congress substituted for the former unenforceable indemnity in kind a new and enforceable indemnity in cash.

II

A. The Act of 1929 eliminated any defense of acquiescence, waiver, or estoppel. This is clear not only from the terms of the Act itself, but also from the legislative history and the events which preceded its enactment.

B. Defenses of acquiescence, waiver, and estoppel are inherently unavailable here because railroad land grants are laws as well as grants.

Congress waives their requirements only when it repeals them. Until repealed, the grant has the constancy and command of a statute, and is operative and obligatory on all concerned. Insofar as it is a contract, it is a contract made by Congress, which that body alone may alter. Acts of subordinate officials are ineffective to do so, and mere notice to Congress of a breach does not amount to condonation or approval thereof.

C. But the defenses fail also because their essential elements are lacking. The United States is not barred by laches; *a fortiori,* acquiescence, which is only one element of laches, is no defense. There was no waiver here because Congress did not intentionally relinquish any known rights. To the contrary, a succession of Acts expressly disclaimed either waiver or acquiescence. The circumstance that Congress in the past refused to declare a common law forfeiture certainly is not a waiver of its right later to refuse further performance of the contract, where vested titles are not disturbed. Clearly Congress here never ratified any of the administrative irregularities of subordinate officers. And there was no estoppel. The company has not relied upon any representation by the United States, nor has it changed its position to its disadvantage because of anything the United States has done or left undone. The company's last construction work was done in 1887. Most of the matters relied upon by the company in support of its plea of estoppel transpired after that date.

Several of the Acts of Congress relied upon expressly disclaim any waiver or acquiescence. Nor can any estoppel be fashioned out of acts of government officials. Most of such acts were done pursuant to statutes which explicitly disclaimed any acquiescence or waiver, and it is moreover familiar law that the United States cannot be estopped by the acts of its agents from insisting on the enforcement of its laws.

D. But even if the defenses of waiver, acquiescence, and estoppel were available to the company, Congress undertook to deprive the company of those defenses by the Act of 1929. It could constitutionally do so. At most, such defenses arose out of faults in administration. Such faults can also be cured by subsequent legislation, even though the effect is to defeat existing causes of action. Familiar illustrations are to be found in laws removing the bar of the statute of limitations, or the defense of usury or ultra vires, or validating bonds, or altering the remedies available for the enforcement of existing obligations. All such laws have been held valid, on the principle that no person has a vested right arising out of the mistakes of officers, or to evade con racts which have once become subject to a technical defense. That principle is applicable here. Congress could, consistently with the limitations of the Constitution, direct that the technical defenses availed of here be not a bar to a complete accounting.

E. But finally, and even apart from all of the foregoing, the elimination may validly be affixed as a condition to the right of compensation which the Act of 1929 granted the company. This was, as has been said, a new right. Upon being required to answer the Government's bill, the company had the choice of urging the entire invalidity of the 1929 Act, or of claiming the benefit of its compensation provisions. It chose the latter course. By doing so, it obligated itself to accept whatever disadvantages the Act imposed. A party may not at the same time assail and benefit by a statute. By asking for compensation, the company is estopped, not only from attacking the Act, but also from asserting its plea of estoppel.

III

A. The basic question is whether one party to a contract, which has repeatedly disregarded and violated its own obligations thereunder, is entitled in a court of equity to a decree enforcing complete performance by the other party. Obviously it is not, whether the result be reached on equitable principles or on legal ones. Here the company violated both the conditions and the covenants of its grant; and the breaches have been admitted. The issuance of patents for each twenty-five miles of road as they were completed does not, even on contract principles, bar the United States from now questioning the company's performance. The acceptance of the road as completed is not relevant

to any defects not within the scope of the discretion confided in the officials accepting it. Nor is it material that the United States is still obtaining the benefit of land-grant rates; such rates attach to a road which has been land aided, even as against subsequent purchasers. The land-grant rate is entirely independent of the performance of the original grantee's contract. Still speaking in terms of contract principles, the United States was justified in withdrawing the lands within the indemnity limits, and thus in refusing counter-performance, if at that time the company had in fact substantially breached its contract; and this is so even though the existence of the breaches was not discovered until later. Even where a common-law forfeiture is involved, breaches by the company justify noncompliance with conditions on the part of the United States.

B. The company's failure to complete the main line from Wallula to Portland, as required by the 1870 Resolution, was a substantial breach of its contract. The grant was conditioned on completion of the whole road. It is not disputed that the whole road was not completed. This breach defeated an essential object of the grant, it has not been waived, and it bars the company from any further recovery here.

C. The company admittedly did not open its lands to settlement and preemption, or sell them for not to exceed $2.50 an acre. It was required to

do so by the terms of the Joint Resolution as to all lands owned by it after 1884. The Resolution expressed an important public policy which the courts will enforce. The preemption proviso is applicable to the primary and indemnity belts along the entire line of the road. The legislative history shows that this proviso was intended to be applicable to lands subject to the mortgage authorized by the Resolution of 1870. In any event, the proviso was applicable after the mortgage authorized in 1870 was foreclosed in 1875. And, at the very least, the company was under a duty to sell to settlers on request. It did not do so. It violated the terms of the proviso, and thwarted the public policy which the Resolution was intended to promote. Such violation was a substantial breach of its contract.

D. The company disregarded the terms of the Resolution of 1870 requiring, upon foreclosure of the mortgage there authorized, that the lands be sold at public sale, within the particular State or Territory, in single sections or subdivisions. These provisions, which were also expressive of a dominant public policy against monopoly and mortmain, were violated by the company in 1875 and again in 1896. The company has not excused its violations. The circumstance that these violations were made pursuant to a consent decree is no defense. The matters here complained of are not *res judicata*, and the absence of pecuniary damage to the United States, having in mind that these

breaches frustrated a public policy, is immaterial here.

E. The company made three kinds of illegal dispositions of its assets. It disposed of its capital stock without consideration; it retired its outstanding capital stock by conveyance of its granted lands; and it used the proceeds of granted lands for the construction of numerous branch or feeder lines without first having completed the main line contemplated by the granting Act and Resolution. These matters were expressly relied upon by Congress in declaring the forfeiture. They constitute a fraud on the franchise and a wanton violation of the express requirements of the grants.

G. The company's fraud in connection with the mineral classification under the Act of 1895, admitted on the present record, was a substantial breach of its contract which bars any further claim at law or in equity. Here the doctrine that a party seeking equitable relief must come into court with clean hands is applicable because the company, in two respects, is seeking affirmative relief. It is seeking compensation based on its own alleged superior title; it is also asking for a judgment in its favor in an accounting. In these circumstances, its fraud bars recovery. No Government official ever waived or acquiesced in the company's fraud in this respect.

Each of the foregoing breaches, by itself, is substantial and fully justifies the United States' re-

fusal of counter-performance. But, combined together, the sum total of all the breaches utterly defeats any claim to counter-performance now put forward by the company.

IV

The company must account to the United States for the lands and values it has received without authority of law. This follows both from the terms of the 1929 Act as well as from the established principle that the United States is not bound by the acts of its officers who make unauthorized payments or conveyances under a misconstruction of the law.

A. The company must account for the money received by it in excess of $2.50 an acre for lands sold in violation of the preemption proviso of the 1870 Resolution.

B. The company must account for the values it derived from lands withdrawn from the public domain for its benefit between 1870 and 1890 without authority of law, and which, but for such withdrawals, it would not have received. These illegal withdrawals prejudiced settlers, whose rights would otherwise have been superior to those of the company. Congress intended that the company should account for these values. Unless the company is required thus to account, the full accounting contemplated by the 1929 Act cannot be had.

V

If the Court sustains the Government's contention that the company has so far and so substantially breached its contract as to be entitled to no further performance from the United States, the company will of course receive no compensation. Only in the event that the Court decides the question of breach against the United States will the matter of compensation become material.

A. The *Forest Reserve* case, 256 U. S. 51, holds that the legality of withdrawals depended on whether, when they were made, the lands in the indemnity limits which remained were sufficient to satisfy all the losses. Since the Northern Pacific grant was a place grant, it carried no guaranty that any specific quantity of land be received; the operation of the indemnity provision was akin to the effect of the residuary clause in a will. The rights of settlers in the indemnity limits were superior to those of the company prior to selection. And it is settled that any withdrawals of lands within the indemnity limits for the benefit of the company were illegal. From this it follows that the *Forest Reserve* case is no more than an application of the familiar principle of contract law that a party cannot by his own act disable himself from performing his contract.

B. The court below misapprehended the ruling of the *Forest Reserve* case. It should have considered unsurveyed land in determining the valid-

ity of withdrawals, because, to the extent that such lands remained unappropriated within the indemnity limits, the United States had not disabled itself from performing its contract. In any event, it should have considered subsequent restorations and subsequent surveys, because, to the extent that surveyed lands were later available for selection, the United States was once more in a position to perform its obligations under the contract. It should have held, moreover, that withdrawals which left insufficient lands to satisfy the losses were invalid only to the extent of the deficiency, and not wholly invalid. The gravamen of the company's injury is not the curtailment of its right of selection, but the occurrence of a deficiency.

E. Even apart from all of the foregoing, the company is not entitled to any compensation because it cannot prove the existence of any deficiency. If the company had complied with its obligation to build the main road from Wallula to Portland, no deficiency would have occurred. Because of the failure to complete the road, the company has by its own act cut down the amount of land available for indemnity; this affords no ground for awarding recovery against the United States. Moreover, the company is not entitled to compensation for all the lands described in the decree, since it has failed to show that it would or could have selected or obtained all of such lands. Prior to selection, the settlers had superior rights.

They could, in addition, initiate rights prior to survey; the company could not. The effect of the decree below is to treat the withdrawn lands as though they had been withdrawn for the benefit of the company. This is a result which the Land Department could not legally have brought about by deliberate action. The contingency present here bars compensation; the record does not establish whether the company was damaged, or to what extent; and the necessary facts cannot be supplied by conjecture.

ARGUMENT

I. THE ACT OF 1929 REQUIRED A COMPLETE JUDICIAL ACCOUNTING BETWEEN THE UNITED STATES AND THE COMPANY, AND PROVIDED RELIEF APPROPRIATE THERETO [13]

The first two points in the present brief are submitted in response to the Court's request for argument on "the purpose, scope, and effect of the Act of June 25, 1929, the relief thereby afforded the parties, and the defenses made available to them." The defenses are considered in Point II; the other general topics specified are discussed under the present heading.

Obviously, these topics are fundamental to the entire controversy, for not until the purpose, scope, and effect of the 1929 Act have been clarified is it possible to arrive at a proper solution of the subsidiary questions involved.

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[13] Assignments 21 and 22 (R. 654), *supra*, p. 43.

The first inquiry is as to the meaning of "forfeiture" as used in the Act. What kind of a forfeiture did Congress declare? What was forfeited, and why? The company, the master, and the court below have all assumed, apparently without any study of the committee reports or legislative history of the 1929 Act, that Congress intended to declare a strict common-law forfeiture, for breach of condition subsequent, of land titles already vested in the company. Actually, however, as we shall show, no such forfeiture was intended or enacted. All Congress did was to declare forfeit the company's executory claims to additional lands, and that declaration was the result of an extensive inquiry which had revealed a number of breaches of its contract on the part of the company. The declaration of forfeiture was, in substance and effect, a declaration that the company was no longer entitled to counterperformance because of those breaches.

The second question concerns the scope of the 1929 Act. The company, the master, and the court below have construed the statute as though it were a direction to assess damages against the United States for breach of a contract, without reference or inquiry as to whether the company had itself complied with the terms of that contract. Actually, Congress intended something vastly different. It directed a mutual accounting. It directed that the court inquire into every item of account in the trans-

action between the company and the United States, and consented to a judgment only for the balance due. As we shall show, an examination of one side of the account only, whether for the benefit of the United States or otherwise, was farthest from the contemplation of the Congress. Here again, a different answer to the basic question leads to very substantial differences in the final result.

Third, the effect of the act was to confer upon the company a new right never before possessed, a right to compensation in case the withdrawals should be adjudged invalid. Before this time, the company had admittedly been helpless against withdrawals. This point becomes material if it is later necessary to inquire as to the power of Congress to condition the right bestowed.

And, finally, there is the question whether the 1929 Act was an instance of the power of eminent domain, or is simply what it purports to be, an exercise of the reserved right to alter or amend. That question becomes material if compensation should be found payable. *Cf. Jacobs* v. *United States,* 290 U. S. 13; *Board of Commissioners* v. *United States,* 308 U. S. 343. We contend that the reserved power to alter or amend was involved, that Congress simply awarded, in lieu of losses in the place limits, a new indemnity in cash instead of the former indemnity in kind.

A. THE FORFEITURE DECLARED BY SECTION 2 WAS A DECLARATION THAT, IN THE OPINION OF CONGRESS, THE COMPANY HAD BY REASON OF ITS SEVERAL BREACHES OF CONTRACT NO FURTHER CLAIMS AGAINST THE UNITED STATES

Section 2 of the Act of June 25, 1929,[14] declares that "all of the unsatisfied indemnity selection rights, if any exist," claimed by the company, and "all claims to additional lands under and by virtue of" the granting Act and Resolution, are forfeited to the United States.

As will be shown, this declaration of forfeiture was a declaration by Congress, one of the parties to the land grant contract, that the other party had so far and so substantially violated the same

[14] The legislative history of the Act of June 25, 1929, can be be briefly stated. The Joint Committee reported identical bills, S. 5855 and H. R. 17212, to the 2d Session of the 70th Congress. The bills were accompanied by identical reports, H. Rep. 2628; S. Rep. 1845. The House passed H. R. 17212 after the Chairman of the Joint Committee agreed to strike out the preambles thereto, 70 Cong. Rec. 4640–41; but the 70th Congress adjourned before action could be taken in the Senate.

The bills with the preambles included were reintroduced at the 1st Session of the 71st Congress as S. 669 and H. R. 2151. The preambles were objected to in the Senate, and stricken, whereupon the bill passed both houses with little debate and only a clerical amendment. 71 Cong. Rec. 2169–71; 71 *id.* 3071–72. The committee reports on the bill as passed, S. Rep. 5, H. Rep. 2, 71st Cong., 1st Sess., incorporated by reference the remarks of the Chairman of the Joint Committee made in the House in the 70th Congress. 70 Cong. Rec. 5118–22. See Appendices B and C. In all other respects these reports were identical with those submitted to the previous Congress.

as to forfeit any rights thereunder to indemnity lands not yet conveyed. Section 2 was not, nor did it effect, a common law forfeiture. It did not affect lands which had already been conveyed, nor did it revest in the United States titles already vested in the company. Actually, as will be seen, a strict common law forfeiture upon breach of condition subsequent was never intended. Yet the master assumed that the Act was intended to have that effect (R. 287, 383–385), and the same erroneous assumption as to the purpose and effect of Section 2 underlay much of the company's argument at the hearing last Term.

The report of the Joint Committee and the Congressional debates leave no room for doubt that the purpose of Congress was to declare, on behalf of the United States as one of the parties to the contract, that the company by its breaches and violation thereof had disentitled itself to further performance. Thus, the report (S. Rep. 5, 71st Cong., 1st Sess., App. B) states that the record before the Joint Committee shows "that these obligations [of the granting Act and Resolution] have not been fully complied with by the company"; and, further, after stating the substance of Section 2:

> The committee having considered all the facts and circumstances believes that this limited forfeiture is justified.

As has been noted, the committee report incorporated by reference what Chairman Colton had

said in the 70th Congress, when the identical bill was before the House. Mr. Colton on that occasion stated (70 Cong. Rec. 5121):

> The testimony taken at the hearings shows that the Northern Pacific Railroad Co., or its successor, the Northern Pacific Railway Co., has not made a full compliance with the obligations, expressed and implied, that were contained in the act of July 2, 1864, and the resolution of May 31, 1870.
>
> Your committee is of the opinion that the grantee railroad company and its successor are not now entitled to the same compensation from the United States they would have been entitled to receive had they made a full and complete compliance with the obligations that were contained in the act of July 2, 1864, and the resolution of May 31, 1870, and which the grantee railroad company obligated itself to perform.
>
> Likewise, your committee is of the opinion that the grantee railroad company or its successor should not now be permitted to profit under the land grants at the expense of the United States through transactions that were collusive, fraudulent, or otherwise illegal. The testimony taken at the hearings shows that there were such transactions. Your committee is of the opinion that the grantee railroad company or its successor is not entitled to any further lands from the United States.

But, at the same time, the Chairman pointed out that the forfeiture declared by the bill did not affect any lands which were then vested in the company, and he emphasized that the ultimate extent of the forfeiture was a subject for judicial determination. He said (70 Cong. Rec. 5121):

> Section 2 declares a forfeiture by the United States of the unsatisfied indemnity selection rights, if any exist, which are held by the grantee, Northern Pacific Railroad Co., or its successor, the Northern Pacific Railway Co. The forfeiture does not affect any land to which title has passed from the United States. The extent of the forfeiture of the unsatisfied indemnity rights is necessarily dependent upon what the courts hold the grantee railroad company or its successor is entitled to receive under the granting acts. * * *

The same qualifications were made by Mr. Letts, in charge of the bill in the House in the 71st Congress (71 Cong. Rec. 3071):

> * * * It declares a limited forfeiture of the land grant, the forfeiture being confined to selection rights that have not as yet been satisfied by the company, and it provides for the institution of court proceedings in connection with other points that will have to be litigated before a final conclusion can be reached as to respective rights of the Government and the Northern Pacific.

The fair and deliberate character of the Congressional declaration is borne out, not only by the provision for ultimate judicial decisions of the questions at issue, but by the detailed and careful recital of the matters which were considered and weighed by the Joint Committee before it arrived at its decision. To quote once more from Mr. Colton (70 Cong. Rec. 5121–22):

> Your committee having in mind that the granting acts to the Northern Pacific Railroad Co. were laws as well as grants were unanimously of the opinion that Congress now has the right to declare the forfeiture provided by section 2 of H. R. 17212 and that such a forfeiture, by reason of the facts as disclosed at the hearings, should be declared. In this connection it should be borne in mind that any forfeiture declared by Congress is subject to review in the courts if the grantee railroad company or its successor desires to contest the forfeiture.
>
> In arriving at the conclusion that the forfeiture should be declared, your committee was influenced by, among other things: (a) the failure of the grantee company to construct the railroad within the time specified and otherwise, as required by the granting acts; (b) the fraudulent and illegal mineral classifications under the act of February 26, 1895; (c) the collusive sales of the granted lands in violation of and in evasion of the provisions of the resolution of May 31, 1870, in connection with the foreclosure of the

mortgages coincident with the 1875 and the 1896 reorganizations of the Northern Pacific Railroad Co.

The United States was not a party to any of these proceedings: (d) The failure of the Northern Pacific Railroad Co. to dispose of any of the granted lands through settlement and preemption after July 4, 1884, as required by the resolution of May 31, 1870; (e) the benefits obtained by the Northern Pacific Railroad Co. through the illegal withdrawals on general route and through the illegal withdrawals of indemnity lands; (f) the disposition of the capital stock of the Northern Pacific Railroad Co. under the original interests agreements in violation of section 10 of the act of July 2, 1864; (g) the issuance of the capital stock before and after the 1875 reorganization, without compensation being made therefor; (h) the illegal disposition of granted lands for preferred stock and the illegal cancellation of the preferred stock; (i) the laches of the Northern Pacific Railroad Co. in making indemnity selections while lands were available; (k) the affiliated land and construction companies; (l) the additional values received by the grantee or its successor under supplemental acts of Congress. These propositions were given weight, singly and collectively, by your committee in arriving at the conclusion that the forfeiture covered by section 2 of H. R. 17212 be declared.

And, in order to insure that no injustice be done the company, Section 1 of the bill provided for

compensation to the company "to the extent and in the amounts, if any, the courts hold that compensation is due from the United States."

In other words, Congress used the word "forfeited" in the sense of declaring to the company that it had, by reason of its breaches of contract, forfeited any further executory rights under the grants. Far from prejudging the controversy, Congress provided for court proceedings to ascertain and determine the rights of the parties, and it made express provision for compensation in case its own maturely reached conclusion should ultimately be found wrong. Congress did not declare a common-law forfeiture of vested titles for breach of condition subsequent. It simply declared forfeit the company's executory rights, because of breach of covenant, noncompliance with condition precedent, and breach of condition subsequent as well. That is all that the declaration of forfeiture means, and all it was intended to mean. Possibly it has the effect of shifting the burden of proof to the company,[15] but this will be material only insofar as it should prove necessary to try any of the stricken issues on the merits.

Nor is there any foundation for the contention, contained in the company's answer (R. 246), that

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[15] Mr. Letts: "* * * [The bill] will strengthen the Government's position. At present the burden of proof is on the Government to sustain its contentions. If we pass this bill, the burden of proof will rest on the railroad company." 71 Cong. Rec. 3071.

Section 2 is unconstitutional and void. Such an invocation of the inviolability of vested rights pushes into view the rights conferred by the granting acts and puts wholly out of view the wrongs committed by the company. *Cf. Oregon & California R. R. Co.* v. *United States*, 243 U. S. 549, 559. Therein lies the basic fallacy of the claim of unconstitutionality. The Fifth Amendment protects only contracts, not breaches of contract. It does not guarantee performance of a contract where a breach has excused further performance.

B. CONGRESS INTENDED TO LEAVE THE ULTIMATE ADJUSTMENT OF THE PARTIES' RIGHTS TO THE COURTS.

The purpose of the Act of 1928 to provide for a judicial rather than a legislative disposition of the issues in dispute between the parties, and to compensate the company if the contentions of the United States should prove not well taken, appears at many places. Section 1 awards the company such compensation as the courts shall hold to be due. Section 5 provides for a judicial determination of all controversies between the company and the United States, specifying them in detail. Section 6 prescribes a formula for the accounting, and directs the court to enter an appropriate judgment or decree for whatever balance is ultimately awarded. These particular provisions are discussed in detail below, pp. 73–76.

The same view is reflected in the committee reports. The committee stated that the record of the hearings showed

* * * that it is desirable that a speedy and final adjustment of the grants be had; that the decision of the courts be obtained on the controverted questions of law and fact, and that the respective rights of the United States and the Northern Pacific Railroad Co. and/or its successor, the Northern Pacific Railway Co., be fully and finally established.

We are presenting with this report a bill under which it is contemplated that proper proceedings shall be instituted by the Attorney General of the United States to procure a final and complete determination of the respective rights of the United States and the Northern Pacific Railway Co. to the end that the grants shall be finally adjusted and the interests of the United States and the grantee shall be fully protected. We are convinced that such legislation is necessary to protect the interests of the United States and to determine the issues involved.

And identical sentiments are reflected by the debates.[16]

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[16] Mr. Colton in the House, 70th Congress (70 Cong. Rec. 3121):

"The bill if enacted will permit the United States to go into the courts on a comprehensive basis, and at the same time it will afford the grantee railroad company or its successor an opportunity to be fully heard in support of such contentions as it may desire to make in opposition to any position taken by the United States in the court proceedings.

* * * * *

"The extent of the forfeiture of the unsatisfied indemnity rights is necessarily dependent upon what the courts hold

In view of this manifest and clearly expressed purpose, and in view of the scrupulous regard which the Act displays for the company's rights, it is difficult to understand the remark in the company's orginal brief (p. 27) that "it is really an act to declare a breach of contract by the United States."

Quite to the contrary, Congress did not undertake to decide finally the controversy between the parties. What it did do was to announce that, speaking for the United States, it believed that its obligations under the contract were discharged, and it directed

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the grantee railroad company or its successor is entitled to receive under the granting acts.

* * * * *

"In this connection it should be borne in mind that any forfeiture declared by Congress is subject to review in the courts if the grantee railroad company or its successor desires to contest the forfeiture."

Senator Walsh of Montana, 71st Congress (71 Cong. Rec. 2169):

"The bill provides that the whole matter shall be submitted to the courts for determination as to whether the company has or has not complied with the conditions. * * * That is the reason why I believe these recitals in the preamble [of breaches by the company] ought to be stricken from it."

Mr. Letts in the House, 71st Congress (71 Cong. Rec. 3071):

"It provides a method by which differences growing out of the Northern Pacific land grants may be fought out in the courts. Unquestionably the Government has many interests and rights that are not now protected in any way. The Forest Service is particularly interested in having these uncertainties ironed out, and this bill provides a method of doing that and of getting these questions into court for ultimate decision, so that the Government and the Forestry Department may be fully protected."

that suit be commenced so that the matter might be adjudicated in the courts. The entire transaction evidences the utmost good faith on the part of Congress.

What was said by this Court in *United States* v. *Southern Pac. R. R. Co.*, 146 U. S. 570, 592–93, seems applicable here:

> The contention of the Government is, that these lands were not included within the grant to the Southern Pacific. Such contention implies no want of good faith on its part. It is not attempting to take back or forfeit that which it has once granted. It is only seeking, a difference of opinion having arisen, an adjustment, a determination of the extent of its grant. Less than that could not be expected; more than that could not be asked of it.

C. THE ACT REQUIRED A COMPLETE ACCOUNTING, CREATED A SPECIAL JURISDICTION AND A SPECIAL PROCEDURE, AND PROVIDED RELIEF APPROPRIATE TO WHATEVER DETERMINATION MIGHT ULTIMATELY BE MADE

1. The scope of the judicial determination required by the Act of 1929 is outlined by Sections 5 and 6 thereof.

Section 5 directs the Attorney General to institute a suit or suits to (a) remove the cloud cast upon the title to lands belonging to the United States as a result of the claims of the Northern Pacific Railroad and Northern Pacific Railway Companies; (b) have all controversies and disputes respecting the operation and effect of the grants and actions taken under them judicially determined; (c) have

a full accounting between the United States and the companies; and have a determination (d) of the extent, if any, to which the said companies or either of them may be entitled to have patented to them additional lands of the United States in satisfaction of the grants, (e) whether either of said companies is lawfully entitled to all or any part of the lands within the indemnity limits for which patents have not issued, and (f) the extent to which the United States may be entitled to recover lands wrongfully patented or certified.

In the judicial proceedings directed by this Act, Sections 5 and 6 provide that the court shall consider, make findings relating to, and determine:

(1) To what extent the terms, conditions, and covenants, express or implied, in the granting acts, have been performed by the United States and the Northern Pacific Railroad Company; (2) the extent to which the foreclosure proceedings meet the requirements of the Resolution of 1870 with respect to disposition of granted lands; (3) what lands, if any, have been wrongfully or erroneously patented or certified to said companies or either of them through fraud, mistake of law or fact, or through legislative or administrative misapprehension as to the proper construction of the grants, or otherwise; (4) the amount, if any, the companies are entitled to recover on account of the retention by the United States of indemnity lands.

In making the findings and determination of the amount, if any, to which the company is entitled,

the Act directs the court to determine (a) the full value of the interest which may be rightfully claimed by the companies in the lands under the grants; and (b) what quantities in lands or values the companies have received.

The Act then provides that any excess in lands or values shall be charged to the companies, and the companies shall receive such compensation for indemnity lands retained by the United States as the court shall find due.

The Act provides that all parties shall be entitled to have the court determine all questions of law and fact germane to a complete adjudication of the respective rights under the Act of 1864 and the Resolution of 1870 and supplemental legislation "and all other questions of law and fact presented to the joint congressional committee" appointed pursuant to the Joint Resolution of June 5, 1924.

2. Section 7 of the Act authorizes the commencement of the contemplated suit in a United States District Court "for some district within the states of Wisconsin, Minnesota, North Dakota, Montana, Idaho, Washington, or Oregon," notwithstanding that many of the lands, title to which was to be quieted, were located in districts or states other than the one to be selected as the forum for the suit. Provision was made for process to run into any other district. Thus a special jurisdiction was conferred on an existing court, and a special procedure prescribed.

3. The formula for determining the amount of the judgment in favor of the United States or the company was prescribed in Section 6. If the company prevailed, it was to obtain compensation to the extent of the full value of its interest in the indemnity lands withheld. The title of the United States to these lands was to be quieted in any event. If the United States prevailed, it was to be freed from any obligation in respect of compensation, and was entitled to have the company account to it for any excess values which the company might be shown to have received. Appropriate provision was made for set-offs, and the court was empowered to "render such judgments and decrees as law and equity may require."

D. THE RIGHT TO COMPENSATION CONFERRED UPON THE COMPANY IN THE EVENT IT SHOULD BE FOUND ENTITLED TO PREVAIL WAS A NEW RIGHT, SUBSTITUTED IN THE EXERCISE OF THE CONGRESSIONAL POWER TO AMEND THE GRANTING ACT AND RESOLUTION.

As has been pointed out above, p. 62, and as will be discussed in detail below, the question whether the right of compensation conferred by the 1929 Act was a new right becomes material in the event that inquiry is necessary as to the power of Congress to condition the right. It is likewise material to ascertain, and particularly in determining the amount of compensation payable if any is due, whether the right to compensation flows from the power of eminent domain, or from the reserved right to alter and amend the granting Act and Resolution. Cf. *Jacobs* v. *United States*, 290 U. S.

13; *Board of Commissioners* v. *United States,* 308 U. S. 343.

It is not disputed that prior to the passage of the 1929 Act, there was no way for the company either to compel acceptance and approval of its indemnity selections, or to compel conveyances of indemnity lands which it had theretofore selected, or to obtain compensation in lieu thereof.

It could not compel the conveyance of any such lands, because, before conveyance, title thereto was in the United States, and a suit concerning them was a suit against the United States. *Louisiana* v. *Garfield,* 211 U. S. 70; *New Mexico* v. *Lane,* 243 U. S. 52. It could not force the Secretary of the Interior to accept selection lists for lands which had been withdrawn for forest reserves prior to survey. *Northern Pac. Ry. Co.* v. *Lane,* 46 App. D. C. 434, app. dism. *sub nom. Northern Pac. Ry. Co.* v. *Payne,* 254 U. S. 658. Nor could it sue in the Court of Claims for the value of the indemnity lands which it sought, for the reason that the United States did not admit either the company's ownership of the lands nor its right to receive them, in which circumstances no implied promise to pay just compensation could arise. *Tempel* v. *United States,* 248 U. S. 121; *Hill* v. *United States,* 149 U. S. 593; *Langford* v. *United States,* 101 U. S. 341.

In short, as was stated in the railway's brief at the first argument (p. 10), "The company was helpless to protect its rights against withdrawals."

The Act of 1929, therefore, which for the first time authorized the rendition of judgment against the United States in satisfaction of any valid claims which the company might have in respect of indemnity selections, created a new right.

Moreover, this right to compensation was created, not in the exercise of the power of eminent domain, but simply as an incident of the Congressional power to alter and amend the granting Act and Resolution. Whether the substitution of a right to compensation in the place of a qualified right to obtain indemnity lands would have represented an exercise of eminent domain in the absence of any reserved right to amend the granting acts we need not stop to inquire. With the right reserved to alter and amend, a right which by its terms could be exercised only "having due regard to the rights of said company, and any other parties," Congress could alter or amend the granting acts in any way, subject only to the limitation that "rights actually vested or transactions fully consummated could not be disturbed." *United States* v. *Union Pac. Ry. Co.*, 160 U. S. 1, 37. Here the company's title to the lieu lands had not vested, nor were the transactions in respect thereto consummated. In those circumstances Congress was free to substitute, for the land claimed as indemnity in kind for the place losses, a different indemnity in the form of a money judgment.

Not only the title of the Act, but the debates as well, show that Congress was exerting its reserved

power. Mr. Colton said, speaking of the first section (70 Cong. Rec. 5121):

> The section removes these lands from the operation of the grants and provides that the railroad company shall be entitled to compensation in the event the courts find that compensation is due from the United States. This action is taken under the power reserved by Congress to repeal, alter, or amend the grants.

In view of the very precise and detailed provisions of the Act laying down the matters to be considered and determined in the judicial proceedings thereby authorized, and in view of the circumstances that the Act for the first time afforded the company an opportunity for the judicial ascertainment of its claims and for their enforcement, it is difficult to understand, much less to condone, the action of the court below in striking from the bill of complaint practically every allegation going to the company's breach of the covenants and conditions of the granting acts (R. 411–12).

II. IN THE ACCOUNTING PRESCRIBED BY THE ACT, THE DEFENSES OF ACQUIESCENCE, WAIVER AND ESTOPPEL WERE NOT AVAILABLE TO THE COMPANY [17]

A. THE ACT OF 1929 ELIMINATES THESE DEFENSES

In order to defeat the defenses of the United States against the company's claim to a money

[17] Assignments 4, 6, 8, 11, 21, 22 (R. 652–54), supra, pp. 40–43.

judgment, and to defeat the claim of the United States against the company for lands erroneously patented and values unlawfully received, the company pleaded acquiescence, waiver and estoppel (R. 154–74), and the master (R. 285–89, 383–85) and the court below (R. 411–12) sustained the pleas.

It is perfectly clear that the Act of 1929 eliminates any argument that the United States could not have a full accounting because of acquiescence, waiver, or estoppel. To begin with, the very terms of the 1929 Act eliminate any such defenses. Section 6 specifically requires that "all lands received by the * * * company * * * which have not been earned, but which have been, for any reason, erroneously credited or patented to either of said companies * * * shall be fully accounted for"; it requires a determination of the "full value of the interest which may be rightfully claimed by said companies" and a determination of "what quantities in lands or values said companies have received in excess of the full amounts they were entitled to receive, either as a result of breaches of the terms, conditions, or covenants, either expressed or implied, of said granting acts by said companies, * * * or through mistake of law or fact, or through misapprehension as to the proper construction of said grants, or as a result of fraud, or otherwise, and said excess lands and values, if any, shall be charged against said

companies in the judgments and decrees of said court." The two sides of the account are to be determined in the manner specified.

Moreover, the 1929 Act, read in the light of the investigation which led to its enactment (see *supra*, pp. 24–26), and particularly when considered in connection with the committee report, makes it plain that the litigation directed by Sections 5 and 6 was to search, from the beginning, the whole record of the land grant transactions between the United States and the company. See 70 Cong. Rec. 5121; App. C, pp. 278–79. If an argument to the contrary is implied in the company's assertion of these defenses of waiver, acquiescence or estoppel, it ignores both the terms of the statute and the events which preceded it.

The succeeding sections will show that the defenses of acquiescence, waiver, and estoppel are not open to the company. This is the result even without regard to the Act of 1929, because those defenses cannot be applied to avoid the conditions of a statutory land grant by the United States, and because, in any event, their essential elements are lacking. And, even if the company could otherwise avail itself of those defenses, their elimination by the Act of 1929 is valid because of the general power of Congress to change remedies and to condition the grant of compensation conferred by that statute.

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B. THESE DEFENSES ARE INHERENTLY UNAVAILABLE AGAINST A STATUTORY CONTRACT

The company's pleas here raise defenses which are not novel; similar defenses have been twice presented to and rejected by this Court in a railroad land grant case. *Oregon & California R. R. Co.* v. *United States,* 238 U. S. 393; *Oregon & California R. R. Co.* v. *United States,* 243 U. S. 549. The reason why acquiescence, waiver, and estoppel are not available as defenses is because railroad land grants are statutes as well as grants.[18] No one is authorized to acquiesce in any breach of condition. Congress waives the requirements only when it repeals them. There can be no such thing as an estoppel protecting a party against a violation of law. As this Court said in the first *Oregon and California* case, 238 U. S. at 427:

> We may observe again that the acts of Congress are laws as well as grants and have the constancy of laws as well as their command and are operative and obligatory until repealed. This comment applies to and answers all the other contentions of the railroad company based on waiver, acquiescence, and estoppel and even to the defenses of laches and the statute of limitations.

This is a complete answer to the company's contentions here. Moreover, the legislative history of

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[18] See, in addition to the decisions just cited, *Wisconsin Cent. R. R. Co.* v. *Forsythe*, 159 U. S. 46, 55; *Missouri &c. Ry. Co.* v. *Kansas Pac. Ry. Co.* 97 U. S. 491, 497; *Schulenberg* v. *Harriman*, 21 Wall. 44, 62.

the 1929 Act shows that the rationale and the language of the *Oregon and California* cases were expressly relied upon by Congress as a ground for believing that no rights of the United States had been waived. See 70 Cong. Rec. 5121; Appendix C, pp. 277–78, *infra*.

And there is another basic reason why defenses of the character now urged are unavailable. Treating the grant as a contract, it is very clearly a contract made by Congress. Congress was the contracting officer, with complete and undelegated authority. Whatever may be the rule as to acquiescence where the contracting power is vested in some subordinate official, here no such power was committed to any subordinates, and therefore their acts cannot bind the United States. This principle also was laid down in the first *Oregon and California* case. This Court said (238 U. S. at 424–25):

> It is contended that if sales were made under the limitations of the provisos the breaches were acquiesced in, and for this the action and knowledge of the officers of the Government are adduced—indeed, the knowledge of Congress itself; and reciting what was done under the grants, counsel say: "It is a story of mortgages and sales, executory contracts and conveyances, and a stream of Government patents flowing in between. These things were known of all; they were matters of common knowledge, notoriety, of public record; the railroad knew them; the people knew them; the Government knew

them." And cases are cited which, it is contended, establish that such circumstances might work an estoppel even against the Government, which, when it appears in court, it is contended, is bound like other suitors, and certainly establish that for more than forty years in the view of the executive officers the provisos were not conditions subsequent. Granting their strength in that regard, granting they have some strength in every regard, they have not controlling force, considering the provisos as simple covenants. And they cannot be asserted as an estoppel. No one was deceived, at least no one should have been deceived; no action was or should have been induced by them that could plead ignorance of the provisions and immunity from their responsibility.

The company can no more plead acquiescence or waiver or estoppel here than the accused in a criminal case, charged with the violation of an unrepealed law, can escape conviction on the ground that his prior violations were condoned or even tacitly approved. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 225–227.

Or, as stated in *United States* v. *Southern Pac. Co.*, 259 U. S. 214, 234, where this Court some time ago disposed of a similar plea:

> It is true, as is argued at length by counsel for the defendants, that Congress had opportunity by the reports of its committees, and otherwise, to learn of this lease;

but we are referred to no legislation passed by Congress authorizing or approving of it. In our view the lease for 99 years by the Central Pacific to a rival and competitive company could not legally be made without authorization by federal legislation. In the absence of such action the Central Pacific had not the corporate capacity to make the lease.

C. EVEN IF THESE DEFENSES WOULD OTHERWISE BE AVAILABLE AGAINST A STATUTORY CONTRACT, THAT DOES NOT HELP THE COMPANY, FOR THE REASON THAT ESSENTIAL ELEMENTS OF THOSE DEFENSES ARE LACKING

Even apart from the principles settled in the *Oregon & California* cases, the defenses now urged by the company fall because of their own insufficiency. Essential elements of those defenses are absent in this case.

1. *There was neither acquiescence nor waiver*

(a) Insofar as acquiescence by the Congress and government officers is claimed as a basis for estoppel against the United States, it will be discussed below under estoppel. It is believed, however, that acquiescence is chiefly significant as one element of laches (the other element being prejudice to the defendant). See *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483; where, in the absence of prejudice to the other party,[19] neither lapse of time

[19] See 250 U. S. at 490, and the successive opinions below: *Bogert* v. *Southern Pacific Co.*, 215 Fed. 218, 221; *Bogert* v. *Southern Pacific Co.*, 244 Fed. 61, 64.

nor error in the remedy pursued was held to constitute laches because acquiescence was lacking. Since it is apparently conceded,[20] as it must be, that laches is no defense to a claim by the United States, it is not perceived how acquiescence, which is merely one of the constituent elements of that defense, stands on any higher ground.

(b) Waiver—the intentional relinquishment of a known right—may be either express or implied. There has been no express waiver because only Congress could expressly waive the requirements of the grants, and it has not done so except as to two extensions of the time for the completion of the road. Joint Resolution of May 7, 1866, No. 34, 14 Stat. 355 (App. 53); Joint Resolution of July 1, 1868, No. 47, 15 Stat. 255 (App. 54).

Nor has there been any implied waiver. Insofar as implied waiver involves an element of estoppel, it is discussed under that heading. But it is believed that, under the governing principle that railroad land grants are laws, there can be an implied waiver only in circumstances where the later legislation can be said to have impliedly repealed provisions of the granting acts. That is, there can be no implied waiver without an implied repeal.[21]

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[20] The master ruled that laches was not applicable (R. 284), the company's exception (R. 393) was overruled by the court (R. 411), and no appeal was taken.

[21] We discuss below, under point III, especially at pp. 115–23, the question of waiver as a matter of pure contract law, independent of the statutory feature of the case.

(c) In its answer to the bill of the United States, the company set out no less than thirty-four Acts which are alleged to constitute a waiver of or acquiescence in the matters complained of (R. 156–63). These Acts are analyzed in detail in Appendix D. That analysis shows that none of the Acts has this effect. Not one of them evidences any waiver or acquiescence by Congress. Not one of them discloses any purpose on the part of Congress to relinquish its right to alter, amend, or repeal. And in several of the Acts set out in the company's answer Congress expressly disclaims any acquiescence in the breaches of condition by the company, or any waiver of the rights of the United States, or any relinquishment of the right to declare a forfeiture. Act of July 4, 1884, c. 180, 23 Stat. 76, 90 (R. 156; App. 69);[22] Section 3 of the Act of Mar. 1, 1889, c. 326, 25 Stat. 771 (R. 157; App. 76–77);[23] Section 7 of the Act of Feb. 26,

[22] "*Provided*, That nothing herein shall be construed as in anywise affecting the relation between the Government and said [Northern Pacific] Railroad Company growing out of the grant of land made to said company beyond the right-of-way provided for in said agreement."

[23] "That nothing contained in this act shall be taken or construed as waiving, releasing, or in anywise affecting any right of the United States to forfeit any lands granted to the Northern Pacific Railroad Company by act of Congress to aid in the construction of its line of railroad, by reason of the breach of the conditions of any such grant; and any rights to any lands acquired by the Northern Pacific Railroad Company under the provisions of this act shall be taken and held subject to whatever conditions and right of

1895, c. 131, 28 Stat. 683, 686 (R. 158; App. 101);[24] Act of July 1, 1898, c. 546, 30 Stat. 597, 620, 621 (R. 158; App. 111).[25] See also Section 3 of the Act of July 10, 1886, c. 764, 24 Stat. 143;[26] and Section 4 of the Act of Mar. 3, 1887, c. 376, 24 Stat. 556, 557 (App. 72).[27]

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forfeiture now attach to the lands which the Northern Pacific Railroad Company may give in exchange under the provisions of this act."

[24] "*Provided*, That nothing contained in this Act shall be taken or construed as recognizing or confirming any grant of land or the right to any land in the said Northern Pacific Railroad Company, or as waiving or in anywise affecting any right on the part of the United States against the said Northern Pacific Railroad Company to claim a forfeiture of any land grant heretofore made to said company."

[25] "*And provided further*, That nothing herein contained shall be construed as intended or having the effect to recognize the Northern Pacific Railway Company as the lawful successor of the Northern Pacific Railroad Company in the ownership of the lands granted by the United States to the Northern Pacific Railroad Company, under and by virtue of foreclosure proceedings against said Northern Pacific Railroad Company in the courts of the United States, but the legal question whether the said Northern Pacific Railway Company is such lawful successor of the said Northern Pacific Railroad Company, should the question be raised, shall be determined wholly without reference to the provisions of this Act, and nothing in this Act shall be construed as enlarging the quantity of land which the said Northern Pacific Railroad Company is entitled to under laws heretofore enacted:"

[26] "That this act shall not affect the right of the government to declare or enforce a forfeiture of any lands so granted * * *."

"*And provided*, * * * nor shall this act be construed as a declaration of forfeiture of any portion of any land grant for conditions broken, or as authorizing an

Inasmuch as that long list of Acts is presumably the strongest for its purposes that the company was able to find, these express declarations of non-waiver and the patent irrelevance of many of the statutes cited serve only to emphasize the entire absence of any waiver or acquiescence by Congress.

Nor is the master's recital of legislative history (R. 269–70, 384–85) any more to the point. The bills and acts referred to by him, as well as the debates thereon, were all concerned with the desirability or otherwise of common law forfeitures of this and other railroad land grants, involving the forfeiture of patented lands and the revesting of titles which had passed out of the United States. It is difficult to see how the mere refusal of one Congress to pass a bill providing for a common law forfeiture, or to fail to declare a common law forfeiture for breach of condition subsequent in the acts which it does pass, can, in the absence of an express disclaimer of the right ever to declare a forfeiture, bind a subsequent Congress. On this theory of the master's, no proposal embodied in a bill, at least so far as Congress intended to act in the light of past transactions, could ever become law if its opponents could show that Congress had once, after deliberation, rejected it; and every law would be forever proof against amendment once it were

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entry for the same, or as a waiver of any rights that the United States may have on account of any breach of said conditions."

shown that the amendment, when first considered, had been found unacceptable. Such a theory of estoppel against future legislation needs no refutation.

But there is a further fallacy in the master's reasoning. The bills and acts he was discussing provided for a common law forfeiture of lands already vested in the company, whereas the 1929 Act had no purpose to disturb conveyances already made, but looked only to the future, refusing to make further conveyances. Even if it be admitted *arguendo* that there was a waiver of the one kind of forfeiture it does not follow that Congress intended to waive the other. The failure of Congress to exercise all the rights which the United States might have against the company to recall titles which had vested is no indication at all of any intention on the part of Congress to waive the express conditions of the grants as a defense to claims for additional and as yet unconveyed lands within the indemnity limits. *Cf. Jones* v. *United States,* 258 U. S. 40, 47.

(d) Finally, the insubstantiality of the pleas of acquiescence and waiver in the present case receives emphasis when the actions and events here relied upon by the company are compared with the express ratification which would unquestionably be a defense. When Congress has expressly ratified the acts of its agents, it has acted with knowledge of the facts and has been taken to have approved all that went before. *Swayne & Hoyt* v. *United States,* 300

U. S. 297; *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226; *United States* v. *Heinszen & Co.*, 206 U. S. 370; *Mattingly* v. *District of Columbia*, 97 U. S. 687; *cf. Tiaco* v. *Forbes*, 228 U. S. 549. The contrast between the cited cases and the present litigation is marked and itself serves to support the conclusion that Congress here had not precluded itself from obtaining an accounting of the company's defaults.

2. There was no estoppel

The company's defenses of waiver and acquiescence against the statutory contract here involved all shade, more or less imperceptibly, into estoppel. But estoppel is likewise unavailable as a defense.

(a) An estoppel arises from a representation of fact which has been relied upon and has resulted in a change of position. In the present case, passing the point that the inaction of Congress is hardly a representation that succeeding Congresses will be likewise inactive, the company cannot show any reliance on anything the United States did or did not do.

The United States has made no representations to the company, nor has the company changed its position to its disadvantage because of anything the United States has done or left undone.

The company's last construction work was done in 1887. Since that time it has neither done nor failed to do anything to its disadvantage in reli-

ance upon the conduct of any governmental official, and since that time all that has been done has resulted to the advantage of the company. Yet most of the acts of Government officials upon which the company bases its plea of estoppel were done after 1887.[28] "Such acts lack all the elements of an equitable estoppel. The * * * company was not led thereby to do or to omit to do anything. It did not rely upon, nor was it affected by, any of the acts it now calls attention to." *Illinois Surety Co.* v. *John Davis Co.*, 244 U. S. 376, 382.

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[28] The only acts of government officials antedating 1887 are the following: (1) Acceptance by the Interior Department of maps of definite location; (2) acceptance by the President of sections of the road as completed; (3) passage of the Act of July 15, 1870, c. CCXCII, 16 Stat. 291, 305 (App. 60), requiring the payment of survey fees prior to issuance of patents; (4) passage of the Acts of July 10, 1882, c. 284, 22 Stat. 157 (App. 61) and July 4, 1884, c. 180, 23 Stat. 76, 89 (App. 69), requiring the company to pay for rights-of-way through the Crow and Flathead Reservations, respectively; and (5) requiring the transportation of troops, mails, &c., at land-grant rates.

Acceptance of the maps of definite location obviously involved no estoppel on any theory. That the acceptance of the successive sections of the road did not create an estoppel against the assertion of other breaches, even as a matter of contract apart from the statutory grant, is shown at pp. 115–19 below. The statutes in question are discussed and analyzed in detail in Appendix D, pp. 281–95. And the transportation of troops, mail, &c., at land-grant rates does not involve any estoppel, because those rates attach to the road once the road has been land-aided, even as against subsequent purchasers and regardless of the extent of the aid or of the performance of the contract. *Grand Trunk Western Ry. Co.* v. *United States*, 252 U. S. 112; *Chicago &c. Ry. Co.* v. *United States*, 217 U. S. 180.

Even on the assumption that the United States was charged with knowledge of such of the company's breaches as were not revealed until the Joint Committee hearings, the fact that the officers of the Land Department continued to issue patents to the company does not estop the United States from now setting up those breaches in bar of the company's claim for compensation in respect of additional indemnity lands. Here again, this Court's decision in the first *Oregon & California* case, 238 U. S. 393 at 424–25 (quoted *supra*, pp. 83–84) is a complete answer to the company's contentions.

Moreover, the present case is actually a stronger one so far as the United States is concerned, for here, see pp. 87–88, *supra*, the company was several times put on explicit notice that Congress expressly disclaimed any intention to waive or to acquiesce in the company's nonperformance of the conditions of the granting acts. And, as shown in Appendix D, pp. 284–55, 288–89, and at pp. 88–89 above, footnotes 24 and 27, the General Adjustment Act of March 3, 1887, and the Mineral Classification Act of February 26, 1895, pursuant to which most of the patents were issued, both contained such disclaimers. It seems fair to argue, therefore, that an express refusal to waive or to acquiesce was written by law into each patent as it issued.

(b) An additional reason why the defense of estoppel is not available here is because that plea necessarily involves the conduct of Government

officers. Whatever the rules as to estoppel in dealings between individuals, they cannot control here, where the dealing has been with the Government. As this Court early said in *Whiteside* v. *United States,* 93 U. S. 247, 256:

> Different rules prevail in respect to the acts and declarations of public agents from those which ordinarily govern in the case of mere private agents. Principals, in the latter category, are in many cases bound by the acts and declarations of their agents, even where the act or declaration was done or made without any authority, if it appear that the act was done or declaration was made by the agent in the course of his regular employment; but the Government or public authority is not bound in such a case, unless it manifestly appears that the agent was acting within the scope of his authority, or that he had been held out as having authority to do the act, or was employed in his capacity as a public agent to do the act or make the declaration for the Government.

This general principle was given specific formulation in *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 409:

> A suit by the United States to enforce and maintain its policy respecting lands which it holds in trust for all the people stands upon a different plane in this and some other respects from the ordinary private suit to regain the title to real property or to remove a cloud from it.

The Government cannot be bound by the unauthorized acts of its agents,[29] and all persons dealing with such agents are charged with notice of the limits of their authority.[30] These propositions are so firmly established that only their familiarity can explain the circumstance that the master and the court below completely overlooked them. And yet those propositions are decisive of the company's contention that the United States is estopped, for here all power in respect of the land grant contract was vested in Congress, and no officer was authorized to vary that contract in any way. This is not a

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[29] *Lee* v. *Munroe*, 7 Cranch 366; *Hunter* v. *United States*, 5 Pet. 173; *Hawkins* v. *United States*, 96 U. S. 689; *Moffat* v. *United States*, 112 U. S. 24; *Steele* v. *United States*, 113 U. S. 128; *Wisconsin Centr. R. Co.* . *United States*, 164 U. S. 190; *Pine River Logging C* v. *United States*, 186 U. S. 279; *Slavens* v. *United States*, 196 U. S. 229; *Jeems Bayou Fishing and Hunting Club* v. *United States*, 260 U. S. 561; *Cramer* v. *United States*, 261 U. S. 219; *Yuma County Water Users' Association* v. *Schlecht*, 262 U. S. 138; *Utah* v. *United States*, 284 U. S. 534; *United States* v. *City and County of San Francisco*, 310 U. S. 16; *United States* v. *District Director of Immigration*, 82 F. (2d) 630 (C. C. A., 7th); *The Tahoma*, 87 F. (2d) 349 (C. C. A., 9th); *Spencer* v. *United States*, 14 F. Supp. 46 (D. Mass.).

[30] See, in addition to the cases cited in the preceding note, *Camp* v. *United States*, 113 U. S. 648; *Hume* v. *United States*, 132 U. S. 406; *Maryland Steel Co.* v. *United States*, 235 U. S. 451; *Sutton* v. *United States*, 256 U. S. 575; *Wilber National Bank* v. *United States*, 294 U. S. 120; *United States* v. *Standard Oil Co. of California*, 20 F. Supp. 427 (S. D. Calif.), *aff'd*, 107 F. (2d) 402, cert. den. 309 U. S. 654, 673, 697; *Ritter* v. *United States*, 28 F. (2d) 265; cf. *Filor* v. *United States*, 9 Wall. 45; 1 Mechem, *Agency* (2d ed.) sec. 763.

case of the Government acting through a contracting officer who has been entrusted with broad powers to contract for the United States, or in whom a wide discretion has been reposed. Here Congress itself was the contracting officer. Its powers in that regard were never confided to subordinates.

It is largely because of this vital circumstance that the decisions relied upon by the company at the first argument in support of its plea of estoppel cannot be regarded as controlling. In most of them, the power to contract had been vested in subordinate officers.[31] In others, persons acted in reliance upon the actions of authorized agents.[32] In one the so-called estoppel was no more than a rule of evidence.[33] The *Eastern Terminus* case, *United States* v. *Northern Pac. Ry. Co.*, 177 U. S. 435, involved an alleged waiver in the absence of any direction by Congress to enforce a forfeiture; it is obviously irrelevant here, where Congress has forcefully declared a forfeiture, save for the purposes of contrast. Nor does *United States* v. *Midwest Oil Co.*, 236 U. S. 459, help the company.

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[31] *Salomon* v. *United States*, 19 Wall. 17; *Maryland Steel Co.* v. *United States*, 235 U. S. 451; *Reading Steel Casting Co.* v. *United States*, 268 U. S. 186; *Dayton Airplane Co.* v. *United States*, 21 F. (2d) 673; *J. Homer Fritch Inc.* v. *United States*, 236 Fed. 133.

[32] *Jones* v. *United States*, 96 U. S. 24; *Pettigrew* v. *United States*, 97 U. S. 385; *United States* v. *Detroit Lumber Co.*, 200 U. S. 321; *United States* v. *Denver &c. R. R. Co.*, 16 F. (2d) 374.

[33] *United States* v. *Stinson*, 197 U. S. 200.

There long continued usage was relied upon, in a doubtful situation, to establish the existence of a challenged power. *Accord, Inland Waterways Corp.* v. *Young,* 309 U. S. 517. But it is a wholly different thing to attempt, as here, to assert the usage as a basis for legalizing what admittedly was never authorized. As was said in the *Inland Waterways* case, 309 U. S. at 524, "Illegality cannot attain legitimacy through practice."

(c) The company is attempting to set up an estoppel in support of its claim against the United States for compensation, to prevent that claim from being defeated by the company's own fraud and breach of conditions.

But the doctrine of estoppel is equitable. It is not to be exercised in behalf of one whose conduct with respect to the subject matter has been iniquitous or unconscionable. *Capital Amusement Company* v. *Board of Common Council,* 210 Ky. 622, 276 S. W. 528, 531; *Dobbins* v. *Texas Co.,* 136 Okla. 40, 275 Pac. 643, 647; *Pacific Finance Corporation* v. *Hendley,* 119 Calif. App. 697, 7 P. (2d) 391, 395; *Minamax Gas Co.* v. *State,* 33 Ohio App. 501, 170 N. E. 33, 36. Here the company is invoking an application of the doctrine to obtain for its own breaches and fraud the sanction of a court of equity. Treating the allegations of the bill as admitted, as on motion to dismiss we must, the company stands before this Court as a wrongdoer.

Equitable principles will not be applied in its favor to "frustrate the purpose of [the United States'] laws or to thwart public policy." *Pan-American Petroleum Co.* v. *United States,* 273 U. S. 456, 506.

D. EVEN IF THESE DEFENSES WERE PRESENT, CONGRESS COULD CONSTITUTIONALLY TAKE THEM AWAY

We have shown above that the defenses of laches, acquiescence, waiver, and estoppel were inherently unavailable, or in any event, that they were not available here because their essential elements were lacking. But if we now assume for purposes of argument that these defenses were both present and available prior to the passage of the Act of 1929, still the company is not helped, for that Act destroyed those defenses. The incorporation into the committee report of the quotation from *Oregon & California R. R. Co.* v. *United States,* 238 U. S. 393, 427, *supra,* p. 82, makes it abundantly clear that Congress did not intend that the formula which it prescribed for the accounting should be defeated by defenses of acquiescence, waiver, or estoppel.

The inquiry, from this viewpoint, is simply whether Congress may consistently with the limitations of the Constitution take those defenses away. It seems plain that it can.

By the Act of 1929, Congress did not retroactively create a liability.[34] Rather, on the present

[34] It may be conceded that this cannot ordinarily be done. *Forbes Boat Line* v. *Board of Commissioners,* 258 U. S. 338; *Charlotte Harbor Ry.* v. *Welles,* 260 U. S. 8; *Union Trust*

assumption, it was merely removing a bar to an inquiry into a liability owed by the company, a bar purely technical and not founded on any principle of abstract justice. In the language of this Court in *Winfree* v. *Northern Pacific Railway Company*, 227 U. S. 296, 301, Congress, by removing these defenses, merely sought to "remedy a mischief, to promote public justice, to correct innocent mistakes, to cure irregularities in judicial proceedings," and "to give effect to acts and contracts of individuals according to the intention thereof." Should these defenses exist they exist only by reason of faulty administration, not by the contracting officer—Congress—but rather by government officials who had no power to change or vary the terms of the land grants. As was said in *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 427, there is "a class of cases in which defects in the administration of the law may be cured by subsequent legislation without encroaching upon constitutional right, although existing causes of action may thus be defeated."

The legislative removal of such defenses invades no vested rights. See *Chicago & Alton R. R.* v. *Tranbarger*, 238 U. S. 67, 76; *New York Cent. R. R. Co.* v. *White*, 243 U. S. 188, 199; *Second Employers' Liability Cases*, 223 U. S. 1, 50; *Munn* v. *Illinois*, 94 U. S. 113, 134. For a recent example see *Can-*

Co. v. *Wardell*, 258 U. S. 537; *Levy* v. *Wardell*, 258 U. S. 542; *Knox* v. *McElligott*, 258 U. S. 546.

penter v. *Wabash Railway Company,* 309 U. S. 23, where an act granting priority to railroad employees for damages for personal injuries over other claimants in equity receivership was held valid, even though the act was passed while certiorari was pending from a contrary decision correctly denying priority. Cf. *McFeddin* v. *Evans-Snider-Buel Co.,* 185 U. S. 505.

A more striking instance of this principle is the validity of legislative action in connection with statutes of limitation; it has long been settled that the legislature may constitutionally remove the impediment of the statute of limitations. *Campbell* v. *Holt,* 115 U. S. 620; *Oshkosh Waterworks Co.* v. *Oshkosh,* 187 U. S. 437; *Waggoner* v. *Flack,* 188 U. S. 595; *Ettor* v. *Tacoma,* 228 U. S. 148.

This whole question was carefully reviewed by this Court at its last Term. *Paramino Lumber Co.* v. *Marshall,* 309 U. S. 370. There an award had been made by the Deputy Commissioner pursuant to the provisions of the Longshoremen's Act. No review was applied for in the time set by the statute and the award became final. Five years later Congress passed an act ordering the compensation commission to issue a new order in the case, Congress feeling that the injured workman should have an opportunity to introduce evidence that his injury had been permanent and to receive an increased award accordingly. There, too, it was argued that this violated the due process clause of

the Fifth Amendment. In rejecting that argument this Court used language that is particularly pertinent to the instant case, stating (p. 378–379):

> But we do not agree that the immunity obtained by the lapse of the time for review is the type of immunity which protects its beneficiary from retroactive legislation authorizing review of the claim. This private act does not set aside a judgment, create a new right of action or direct the entry of an award. The hearing provided for is subject to the provisions of the general act for longshoremen's and harbor workers' compensation. It does not operate to create new obligations where none existed before. It is an act to cure a defect in administration developed in the handling of a compensable claim. If the continuing injury had been known during the period of compensation, payments of the same amount due under the award authorized by this act would have been due to the employee. In such circumstances we see no violation of the due process clause. * * * It is unimportant whether the claim persisted after the bar or ended with the running of limitation. To cure a fault of administration Congress may validly enact this act.

In the words of the *Paramino* case, Congress did no more in the act of 1929 than to provide for the curing of various faults of administration where the injury involved was a continuous one. See also *Independent Pier Company* v. *Norton*, 12 F. Supp.

974 (D. C. E. D. Pa.). Here, as in *Campbell* v. *Holt, supra,* at 629, the legislation does no more than to prevent a party from evading its honest obligation.

It is true that in *Campbell* v. *Holt, supra,* the court distinguished cases where real or personal property rights were involved and that subsequent cases have held that the removal of the statute of limitations involving real and personal property constituted an unconstitutional deprivation of property. *Bicknell* v. *Comstock,* 113 U. S. 149; *Stewart* v. *Keyes,* 295 U. S. 403. This exception to the rule was intended to stabilize titles. But the present case, so far as it concerns the company's claim for compensation, does not involve disturbance of titles to any real property; and, of course, there never could be any plea of limitations against the government's claim for an accounting. *United States* v. *Summerlin,* 310 U. S. 414; *United States* v. *Whited & Wheless,* 246 U. S. 552. Consequently it could not be urged that the general rule of the *Paramino* case is inapplicable on the ground that title to real property is involved within the distinction laid down in *Campbell* v. *Holt, supra.*

Another analogous line of cases concerns the so-called curative statutes. A typical example is *Ewell* v. *Daggs,* 108 U. S. 143, where this Court sustained a statute which removed the defense of usury for the recovery of interest, although at the time of the loan the defense was a valid one. The

rule established was phrased in language applicable to the instant case, the Court saying (p. 151): "The right which the curative or repealing act takes away in such a case is the right in the party to avoid his contract, a naked legal right which it is usually unjust to insist upon, and which no constitutional provision was ever designed to protect." Or, as stated in *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 429:

> It is apparent, as the result of the decisions, that a distinction is made between a bare attempt of the legislature retroactively to create liabilities for transactions which, fully consummated in the past, are deemed to leave no ground for legislative intervention, and the case of a curative statute aptly designed to remedy mistakes and defects in the administration of government where the remedy can be applied without injustice. Where the asserted vested right, not being linked to any substantial equity, arises from the mistake of officers purporting to administer the law in the name of the Government, the legislature is not prevented from curing the defect in administration simply because the effect may be to destroy causes of action which would otherwise exist.

See also *Swayne and Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 302.

Another example of a curative statute is where the legislature validates bonds which have been issued without authority. *New Orleans* v. *Clark*,

95 U. S. 644; *Read* v. *Plattsmouth*, 107 U. S. 568; *Utter* v. *Franklin*, 172 U. S. 416. Similarly, statutes making valid acts of corporations which had been exercised beyond their power have been uniformly sustained as constitutional. *Gross* v. *United States Mortgage Company*, 108 U. S. 477; *West Side Railroad Company* v. *Pittsburgh Const. Co.*, 219 U. S. 92; *McNair* v. *Knott*, 302 U. S. 369; *Bradley* v. *Santa Cruz County*, 93 F. (2d) 999 (C. C. A. 9); see also *Satterlee* v. *Matthewson*, 2 Pet. 378; *Randall* v. *Kreiger*, 23 Wall. 137; *Williams* v. *Paine*, 169 U. S. 55, 79; *McFaddin* v. *Evans-Snider-Buel Company*, 185 U. S. 505; *United States* v. *Heinszen*, 206 U. S. 370; *Tiaco* v. *Forbes*, 228 U. S. 549; *Forbes Boat Line* v. *Board of Commissioners*, 258 U. S. 338, 339.

Still another analogous line of cases concerns statutes which alter the remedies available for the enforcement of existing obligations. There it is uniformly held that there is "no constitutional right" in any particular form of remedy. *Neblett* v. *Carpenter*, 305 U. S. 297, 305. It matters not that the new remedy is more onerous than the previous remedy, *Shriver* v. *Woodbine*, 285 U. S. 467, for "the parties make their contract with reference to the existence of the power of the State to provide remedies for enforcement and to secure adequate redress in case of breach." *Funkhouser* v. *Preston Company*, 290 U. S. 163, 168; see also *Bronson* v. *Kinzie*, 1 How. 311; *Gibbes* v. *Zimmer-*

man, 290 U. S. 326; *South Carolina* v. *Gaillard*, 101 U. S. 433; *Oshkosh Waterworks Company* v. *Oshkosh*, 187 U. S. 437.

Thus, in *Funkhouser* v. *Preston Co.*, 290 U. S. 163, *supra*, this Court sustained a New York statute providing for the allowance of interest on contracts already in existence, saying (p. 167): "The ascertainment of that loss, and of what would constitute full compensation, was a matter of procedure within the range of due process in the enforcement of the contract. * * *" Likewise, statutes shortening an existing period of limitation or creating a limitation period where none existed before are held constitutional so long as they allow some opportunity for the enforcement of the obligation. *Sohn* v. *Waterson*, 17 Wall. 596; *Terry* v. *Anderson*, 95 U. S. 628; *Koshkonong* v. *Burton*, 104 U. S. 668; *In re Brown*, 135 U. S. 662, 705; *Wilson* v. *Iseminger*, 185 U. S. 55. Statutes requiring that notice of one sort or another be given as a prerequisite to the institution of suits when applied to existing obligations, have also been held to be constitutional, *Curtis* v. *Whitney*, 13 Wall. 68; *National Surety Company* v. *Architectural Company*, 226 U. S. 276, as have statutes providing for a redemption period as applied to mortgages already executed. *Bronson* v. *Kinzie*, 1 How. 311.

Similarly, changes in the method of enforcement have been held constitutional even though applied to existing obligations. *Crawford* v. *Branch Bank*

of Mobile, 7 How. 279; *Railroad Company* v. *Hecht*, 95 U. S. 168; *Tennessee* v. *Sneed*, 96 U. S. 69; *Hill* v. *Merchants Mutual Insurance Company*, 134 U. S. 515; *New Orleans City and Lake Railroad Company* v. *Louisiana*, 157 U. S. 219; *Wilson* v. *Standefer*, 184 U. S. 399; *Waggoner* v. *Flack*, 188 U. S. 595; *Bernheimer* v. *Converse*, 206 U. S. 516; *Henley* v. *Myers*, 215 U. S. 373; *Aikins* v. *Kingsbury*, 247 U. S. 484; *Crane* v. *Hahlo*, 258 U. S. 142.[35]

The guiding principle inherent in all of the decisions cited is that no person has a vested right arising out of the mistakes of officers, or to evade contracts which at some time have become subject to a technical defense. The legislature has a right to intervene for purposes of correction. The basic proposition here is the same; the company cannot claim a vested right to evade the requirements of the land grant contracts by reason of technical defenses arising out of neglect of government agents or their faulty administration of the grants. Congress may, as here it has, direct that those defenses should not be a bar to a complete accounting. Under the Act of 1929 the company is bound by principles which look to the abstract justice of

[35] Other cases in which statutory changes in the remedy or procedure have been sustained although applied retroactively to existing obligations are *Jackson* v. *Lamphire*, 3 Pet. 280; *Hawkins* v. *Barney*, 5 Pet. 457; *Vance* v. *Vance*, 108 U. S. 514; *Oshkosh Water Works Company* v. *Oshkosh*, 187 U. S. 437; *Jetton* v. *University of the South*, 208 U. S. 489, 501; *Arnett* v. *Reade*, 220 U. S. 311; *Conley* v. *Barton*, 260 U. S. 677.

the case, and can find nothing in the Constitution which prevents Congress from altering existing remedies and procedures which would obstruct attainment of a just result. *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 349–50; *United States* v. *Jefferson Electric Co.*, 291 U. S. 386, 403; *cf. Pepper* v. *Litton*, 308 U. S. 295.

E. EVEN IF THESE DEFENSES COULD NOT ORDINARILY BE TAKEN AWAY BY CONGRESS, THEIR REMOVAL CAN BE AFFIXED AS A CONDITION TO THE COMPENSATION WHICH THE ACT OF 1929 GRANTS THE COMPANY

Finally, whatever the merits of the defenses of acquiescence, waiver, or estoppel as original propositions, and whatever the power of Congress to destroy them by legislative act, their elimination may validly be affixed as a condition to the right of compensation which the Act of June 25, 1929, grants the company.

As has been pointed out, supra, pp. 77–78, there was no statutory authority prior to the enactment of the 1929 Act under which the company could have maintained a claim against the United States for a money judgment based upon the granting Act and Resolution. The Act of 1929 furnished the first congressional authority for the maintenance of such a suit by the company. The Act set out the conditions upon which such a claim might be maintained. It prescribed that "in fixing the amount, if any, the said companies are entitled to receive * * * the court shall determine the full value of the interest which may be rightfully

claimed by said companies * * * and shall determine what quantities in lands or values said companies have received in excess of the full amounts they were entitled to receive * * *." And, as has also been pointed out, the purpose of Congress was to require that this accounting be had irrespective of any defenses of acquiescence, waiver, or estoppel which might be asserted.

Complying with the mandate of Congress, the Attorney General commenced the contemplated suit and expressly alleged in the bill of complaint that the company had violated its contract in certain particulars; that it had been guilty of fraud against the United States in the course of the administration of the grants; and that administrative errors had occurred by reason of which the company had received enormous values to which it was not entitled under the terms of the grants. Some of these allegations supported the contentions of the Government that it was entitled to retain the withdrawn forest reserve lands free from any claim of the company to compensation therefor. Others were assertions of claims on the part of the United States which it asked be offset in the accounting against any amount which might be allowed in favor of the company, the excess, if any, to be reduced to a money judgment in favor of the United States.

Upon being required to answer the Government's bill, the company had a choice of asserting the en-

tire unconstitutionality of the Act of June 25, 1929, and urging that the suit be dismissed, or of claiming the benefits of those provisions of the Act which authorized an award of a money judgment for the value of its interest, if any, in the indemnity lands in dispute. It chose the latter course. It chose to assert in the suit that it had valid indemnity selection rights which had not been satisfied and which, prior to the passage of the Act of June 25, 1929, and in the absence of any forest withdrawals, it had a right to assign in the selection of the indemnity lands in question. It prayed for a money judgment against the United States by reason of such indemnity claims (R. 248). While its claim of any right to the indemnity lands in question had to be predicated upon its faithful performance of the granting acts, its claim to a money judgment was necessarily based on the provisions of the Act of June 25, 1929. Independently of the latter Act it could not have obtained a money judgment.

By choosing the latter of these two courses and claiming the benefits of the Act of 1929, the company obligated itself to accept whatever disadvantages the Act imposed.

Congress did not need to waive its sovereign immunity from suit, or to afford the company a forum in which it could obtain a money judgment against the United States, but it did so. When it did it prescribed how, if the company was entitled to a judgment, the amount of that judgment

should be ascertained. Breaches of the contract by the company and excess values already received by it were to be taken into consideration, and defenses of acquiescence, waiver, and estoppel were to be excluded. To the extent that these requirements conditioned the right granted, the company cannot be heard to complain. Having granted the right, Congress was free to condition it as it saw fit. *Williams* v. *United States,* 289 U. S. 553, 581: *Ex parte Bakelite Corpn.,* 279 U. S. 438, 452–454; *Nassau Smelting Works* v. *United States,* 266 U. S. 101, 106; *McElrath* v. *United States,* 102 U. S. 426, 440; cf. *Schillinger* v. *United States,* 155 U. S. 163, 166; *Price* v. *United States,* 174 U. S. 373, 375–76.

When the company availed itself of the benefits of so much of the Act as provided for compensation, it thereby obligated itself to accept the conditions imposed. *Pierce Oil Co.* v. *Phoenix Rfg. Co.,* 259 U. S. 125, 128; *Wall* v. *Parrot Silver and Copper Co.,* 244 U. S. 407, 411–412; *Electric Co.* v. *Dow,* 166 U. S. 489; *Great Falls Mfg. Co.* v. *Attorney General,* 124 U. S. 581, 599.

Otherwise stated, the company cannot at one and the same time rely upon the Act of 1929 for compensation and assert that its provisions are invalid.

It is hornbook law that a party may not at the same time assail and benefit by a statute. *Hurley* v. *Commission of Fisheries,* 257 U. S. 223, 225; *cf. United States* v. *San Francisco,* 310 U. S. 16, 29.

There can be no argument here that the rule is subject to any qualification based on separability, for Congress plainly would not have enacted the provisions providing for compensation to the company without ensuring that the United States could assert all breaches, frauds, etc., which would reduce the compensation to that which the company might justly claim.

By asking for compensation, the company estops itself, not only from attacking the Act, but also from asserting its pleas of estoppel. The situation then calls for application of the familiar principle that an estoppel against an estoppel sets the matter at large. Co. Litt. 352b; *Branson* v. *Wirth,* 17 Wall. 32; *Shean* v. *United States Fidelity & Guaranty Co.,* 263 Mich. 535, 248 N. W. 892; *Western Brokerage & Supply Co.* v. *Reclamation Co.,* 127 Tex. 386, 93 S. W. (2d) 393, 395; *Hopkins* v. *Hopkins,* 174 Miss. 643, 165 So. 414; *Florida Land Inv. Co.* v. *Williams,* 98 Fla. 1258, 116 So. 642.

III. BECAUSE THE COMPANY HAS SUBSTANTIALLY VIOLATED THE COVENANTS AND CONDITIONS OF ITS CONTRACT, IT IS ENTITLED NEITHER TO FURTHER INDEMNITY LANDS NOR TO COMPENSATION

[1] Under this heading are involved, generally, those assignments of error [36] which challenge the correctness of the decision below in awarding a judgment against the United States without considering the

[36] Assignments 24–27, 52–54 (R. 654–55, 658), *supra,* pp. 44–45, 48.

allegations that the company has failed to comply with the terms of the contract on which its claim to such a judgment is based.[37] Otherwise stated, these assignments raise the question of the right of the United States to refuse further performance of its original obligation to permit selections, either at the time when the respective withdrawals were made or subsequent to the passage of the Act of 1929.

As we have shown, the legislative history of that Act shows that the refusal of the United States to make further conveyances of indemnity lands, and the declaration by Congress, in Section 2, that the company's rights to make further selections had been forfeited, were based upon the evidence adduced before the Joint Committee of the company's failure to perform its obligations. The specific breaches relied upon as supporting the declaration of forfeiture were explicitly stated. See pp. 67–68, *supra*. Yet these were the matters which the court below declined even to consider.

A. UNDER FAMILIAR PRINCIPLES OF CONTRACT LAW, THE COMPANY HAS DISENTITLED ITSELF TO ANY FURTHER PERFORMANCE BY THE UNITED STATES BECAUSE OF ITS OWN SUBSTANTIAL BREACHES OF CONTRACT

Under this heading, we approach the case on principles of contract law. The basic question presented is whether one party to a contract, which

[37] Assignments going to the substantiality of the alleged breaches by the company are discussed below under appropriate subheadings.

has repeatedly disregarded and violated its own obligations thereunder, is entitled in a court of equity to a decree enforcing complete performance by the other party. That there were breaches of contract cannot be questioned here. Many of the allegations to that effect are specifically admitted by the answers. All were admitted for the purposes of this case by the company's motion to strike. Principle and authority alike require that these admissions bar the company from compensation or further land patents here.

1. In substance and effect, the company in this case is seeking a decree to enforce as against the United States the specific performance of its contract. To the extent that the lands within the indemnity limits have been retained by the Act of 1929, and a right of compensation afforded in lieu thereof, this is a case of specific performance in substance. It is certainly specific enforcement of the grants as amended in 1929. And, to the extent of 45,178.60 acres of indemnity lands, the decree awards the company specific performance in fact (R. 634).

That is to say, although the company has admittedly violated its contract, it has been awarded specific performance of that contract as against the other party. Such a result runs counter to established principles of equity.[38] A decree for

[38] *Wesley* v. *Eells*, 177 U. S. 370, 376; *Boone* v. *Missouri Iron Company*, 17 How. 340, 343; *Pope Mfg. Co.* v. *Gor-*

specific performance "is not a matter of right. It rests in the sound discretion of the court and generally it will not be made in favor of a party who has himself been in default." *Marble Company* v. *Ripley*, 10 Wall. 339, 357. It "is often material to consider how far the reciprocal obligations of the party seeking the relief have been fairly and fully performed. For if the latter have been disregarded, * * * courts of equity will not interfere." Story, *Equity Jurisprudence* (14th Ed.) Sec. 736.

2. The result is not different if the problem is approached via the route and in the terminology of the common law. The general principles here are elementary.

When one party to an executory contract violates conditions expressed in it, upon which the liability of the other is made to depend, the latter may immediately refuse further performance. *The Eliza Lines*, 199 U. S. 119; *Roehm* v. *Horst*, 178 U. S. 1; *Anvil Mining Co.* v. *Humble*, 153 U. S. 540, 552; *Farmers' Loan & Trust Co.* v. *Galesburg*, 133 U. S. 156, 179; 3 Williston, *Contracts* (Rev. Ed.) § 675.

In addition to the express conditions which are involved in the present case, noncompliance with which was a ground justifying the Government's refusal to perform further, there is also involved a

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mully, 144 U. S. 224, 236; *Marble Company* v. *Ripley*, 10 Wall. 339, 357; *Colson* v. *Thompson*, 2 Wheat. 336, 344; *King* v. *Hamilton*, 4 Pet. 311, 328; *Conway* v. *White*, 292 Fed. 837, 844; 4 Pomeroy, *Equity Jurisprudence* (4th Ed.), Sec. 1407.

breach of the covenants undertaken by the company. This breach of covenant is also a ground for refusal.

Covenants are involved here, because the company undertook to perform the conditions. For example, Section 12 of the Act of 1864 (App. 48) provided for the company's "acceptance of the terms, conditions, and impositions of this Act." Here, then, the company affirmatively contracted to do the things required of it by the Act. *Burke* v. *Southern Pac. R. R. Co.*, 234 U. S. 669, 680; *Wisconsin Cent. R. R. Co.* v. *Forsythe*, 159 U. S. 46, 56; *Broder* v. *Water Co.*, 101 U. S. 274, 276; *State* v. *Hartford and New Haven R. R. Co.*, 29 Conn. 538. To be entitled to receive performance from the United States, the company must show that it likewise has performed.

3. These general principles will hardly be questioned, but their application here has been doubted because, so it is said, issuance of patents for each twenty-five miles of road as they were completed operated to bar any further questioning of performance by the company. Insofar as this contention, made by the company at the first argument, involves any reliance upon principles of waiver, it has been discussed and disposed of above, pp. 86–91. The point material here is that, even as a proposition of contract law, purely and simply, neither the acceptance of the successive portions of the road, nor the issuance of patents for the

place lands thereby earned, bar the United States from setting up the company's breaches of contract as a defense to the claim for further indemnity lands under the executory provisions of the grants.

By section 4 of the Act of July 2, 1864 (App. 42–43), it was provided that on the completion of twenty-five consecutive miles of the railroad and upon a report of commissioners to the President that the road had been constructed in a "good, substantial, and workmanlike manner,"[39] patents were to be issued to the company for place lands along the twenty-five mile strip. By Section 3 (App. 40–41), provision was made for selection of indemnity lands in lieu of unavailable place lands.

The purpose of this method of payment is obvious; payment in land was to be made concurrently with the building of the road so that, from the proceeds derived from the sale of lands already acquired, the company would be aided in the financing of the construction of subsequent sections of the road. Payment was automatic upon the satis-

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[39] Section 5 (App. 43) defined in further detail the requirements intended by the words "good, substantial, and workmanlike manner":

"That said Northern Pacific Railroad shall be constructed in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turnouts, stations, and watering places, and all other appurtenances, including furniture, and rolling stock, equal in all respects to railroads of the first class, when prepared for business, with rails of the best quality, manufactured from American iron. And a uniform gauge shall be established throughout the entire length of the road."

factory completion of each section. Thus upon receipt of a satisfactory report by the commissioners as to the "workmanlike" job on the first twenty-five mile section, the company became entitled to the place lands (if the contract was fully performed in other respects). The commissioners' duties entailed only an inspection of the actual physical railroad equipment; their inspection was not intended to cover any questions of compliance by the company with the various other conditions of the land grant act. Indeed, their inspection would disclose nothing which would bear on the performance of those covenants.

It is well settled that, where the inspection and approval of a specified official goes only to particular matters, such approval does not bar subsequent reliance upon defects not discovered by that official, which were outside the scope of the discretion confided in him. *E. g., United States* v. *Walsh,* 115 Fed. 697 (C. C. A. 2d); *United Construction Co.* v. *Haverhill,* 22 F. (2d) 256 (C. C. A. 2d). Likewise, in the instant case, the duties imposed by the Act of 1864 upon the commissioners other than those relating to the actual construction of the railroad, were not matters left to their discretion.

The obligation of the United States with respect to place lands, on completion of each twenty-five mile sector, was entirely separate from any obligations which depended on performance by the company of covenants relating to matters other than the

physical construction of the road. Consequently such payment could not bar the United States from claiming breaches of the various other covenants. Rather, the land payment constituted one account between the company and the United States. This stated account "may be confined to particular items of account," but as such "it concludes nothing in relation to other items not stated in it." *Perkins* v. *Hart*, 11 Wheat. 237, 256.

The type of contract involved here is similar in many respects to the form of contract for the erection of a building or any similar structure.[40] And, as in those cases, the fact that the payments have been made as the work progressed, pursuant to the terms of the contract, does not estop the defendant from withholding subsequent payments and obtaining damages for substantial defects in construction.[41]

The circumstances that the United States has used so much of the road as was actually completed, and has obtained the benefits of land-grant rates, are quite immaterial. So far as the land-

[40] See, *e. g.*, the various forms of building contracts in Simpson and Dillavou, *Law for Engineers and Architects*, 653 *et seq.*

[41] *Orr* v. *Forde*, 101 Cal. App. 694, 282 Pac. 429; *Burr* v. *Ellis*, 91 Conn. 657, 101 Atl. 17; *Barton* v. *Morin*, 281 Mass. 98, 183 N. E. 170; *Unruh* v. *DeWolf*, 251 Mich. 38, 231 N. W. 92; *Franklin* v. *Schultz*, 23 Mont. 165, 57 Pac. 1037; *Anderson* v. *Todd*, 8 N. D. 158, 77 N. W. 599; *Wiebener* v. *Peoples*, 44 Okla. 32, 38, 142 Pac. 1036, 1039; *Eckhardt* v. *Harder*, 160 Wash. 207, 294 Pac. 981; *cf. Pope* v. *King*, 108 Md. 37, 69 Atl. 417.

grant rate is concerned, that is affixed to the grant of any lands; it binds subsequent purchasers, even though they have received no benefit from the grant. The mere fact that a railroad has once been land-aided makes it subject to the reduced rates. *Grand Trunk Western Ry. Co.* v. *United States*, 252 U. S. 112; *Chicago &c. Ry. Co.* v. *United States*, 217 U. S. 180. The land-grant rate is thus entirely independent of performance or nonperformance of the original grantee's contract.

Nor does the use of the road, apart from the rates, alter the situation. Here again, the building contracts supply an apt analogy. The fact that one occupies a house, or makes use of a completed structure, does not estop him from asserting any breach that may have been made in regard to the construction. For one not to use the building would mean, in addition, that he could not use his own property.[42]

4. The result is not different if the refusal of counter-performance by the United States is found in its withdrawals for forest purposes of lands within the indemnity limits. Such withdrawals, insofar as they resulted in a deficiency in the in-

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[42] *United States* v. *Walsh*, 115 Fed. 697 (C. C. A. 2d); *Thompson-Starrett Co.* v. *La Belle Iron Works*, 17 F. (2d) 536 (C. C. A. 2d); *Belleview Cemetery Co.* v. *Faulks*, 6 Ala. App. 137, 60 So. 461; *Orr* v. *Forde*, 101 Cal. App. 694, 282 Pac. 429; *Burr* v. *Ellis*, 91 Conn. 657, 101 Atl. 17; *Cassinelli* v. *Stacy*, 238 Ky. 827, 38 S. W. (2d) 980; *Pope* v. *King*, 108 Md. 37, 69 Atl. 417; *Edwards* v. *Hall*, 293 Pa. 97, 141 Atl. 638. See 3 Williston, *Contracts* (Rev. Ed.), § 805.

demnity limits of the grant, would constitute a breach of contract by the government on the assumption that the company had fully earned its grant. *United States* v. *Northern Pac. Ry. Co.*, 256 U. S. 51 (the *Forest Reserve* case). If, however, that assumption is shown to be unfounded, if actually the company had not earned its grant but instead had violated the contract, then the forest withdrawals would be justified refusals of counter-performance. And it is immaterial whether the United States had knowledge of the breaches; the significant factor, under settled principles of contract, is that the breaches had actually occurred.

As put by Mr. Williston, a defendant "should be excused from liability if the plaintiff has failed in a material particular to perform his contract although the defendant at the time when he refused to perform or to continue performance was ignorant of the plaintiff's prior breach of obligation. The defendant's excuse in such a case * * * is in substance failure of consideration, and it makes no difference whether or not he discovered prior to the litigation that he was not receiving the return for which he bargained in exchange for his own performance." 3 Williston, *Contracts* (Rev. Ed.) § 839; see *In re Nagel*, 278 Fed. 105, 109 (C. C. A. (2d).[43]

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[43] "Though one who has contracted to buy a horse and to pay the price for him may be morally blameworthy if he repudiates his contract in ignorance of the prior death of the horse, the seller has suffered no legal injury because he

Although this rule has found its most frequent application in cases involving the employer-employee relationship,[44] it has been applied to various other contract situations,[45] and has received the approval of this Court. *College Point Boat Corp.* v. *United States*, 267 U. S. 12. There Mr. Justice Brandeis said (pp. 15–16):

> "A party to a contract who is sued for its breach may ordinarily defend on the ground that there existed, at the time, a legal excuse for nonperformance by him, although he

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could not have carried out the contract on his own part; and, for the same reason, whenever the performance promised to the defendant was not or would not be given as agreed, the defendant can not be held liable on his promise, however ignorant he may be of the plaintiff's default." Williston, *Contracts, loc. cit. supra.*

[44] *Farmer* v. *First Trust Company*, 246 Fed. 671 (C. C. A. 7th); *E. H. Taylor, Jr., and Sons* v. *Julius Levin Company*, 274 Fed. 275 (C. C. A. 6th); *In re Nagel*, 278 Fed. 105 (C. C. A. 2d); *Lubriko* v. *Wyman*, 290 Fed. 12 (C. C. A. 3d); *Von Heyne* v. *Tompkins*, 89 Minn. 77, 93 N. W. 901; *Loos* v. *George Walter Brewing Company*, 145 Wis. 1, 129 N. W. 645; *Thomas* v. *Beaver Dam Manufacturing Company*, 157 Wis. 427, 147 N. W. 364; *Baillie* v. *Kell and Hogg*, 4 Bing. C. P. (N. C.) 638; *Boston Deep Sea Fishing and Ice Company* v. *Ansell*, L. R. 39 Ch. Div. 339; see *Carpenter Steel Company* v. *Norcross*, 204 Fed. 537, 539–540 (C. C. A. 6th).

[45] *Williams Cooperage Co.* v. *Scofield*, 115 Fed. 119 (C. C. A. 8th); *Trinidad Asphalt Mfg. Co.* v. *Trinidad Asphalt Ref. Co.*, 119 Fed. 134 (C. C. A. 8th); *In re London and Mediterranean Bank* (*Wright's Case*), L. R. 7 Ch. App. 55; *cf. Crummey* v. *Raudenbush*, 55 Minn. 426, 56 N. W. 1113; *Clough* v. *London & N. W. Rd. Co.*, L. R. 7 Exch. 26, 33 *et seq.*

> was then ignorant of the fact. He may, likewise, justify an asserted termination, rescission, or repudiation, of a contract by proving that there was, at the time, an adequate cause, although it did not become known to him until later. . .

The same principle governs the instant case. Congress may validate the forest withdrawals made by the United States, on the ground that, when those withdrawals were made, the company had substantially violated the terms of the contract set out in the granting Act and Resolution.

5. The basic principle for which the United States is here contending has already been applied by this Court in a railroad land grant case. *Atlantic & Pacific R. R. Co.* v. *Mingus*, 165 U. S. 413. There Congress had, by the Act of July 6, 1886, c. 637, 24 Stat. 123, forfeited all lands (other than the right-of-way) adjacent to the uncompleted portions of the road and had restored them to the public domain. This involved a forfeiture of vested titles, inasmuch as maps of definite location had been filed. Since the proof showed that the railroad had substantially failed in the performance required of it by the granting act, the Court found no difficulty in upholding the forfeiture. It said (pp. 441–42):

> Upon the whole it does not seem to us that Congress exceeded its powers in forfeiting this grant. The plaintiff company seems to have undertaken its great enterprise in

building a transcontinental railroad without adequate appreciation of the difficulties to be surmounted, which finally caused a total suspension of its work; and, when in 1880, after the panic of 1873 had spent its force, it resumed operations, the time had already expired for the completion of the road, and it was only by the inaction or indulgence of Congress that it was permitted to proceed. *So far as the road was built and accepted by the Government after that time, it was probably entitled to receive its appropriate land grant, but this was rather a matter of favor than of strict right.* During this long period, from 1871 to 1880, it should, under its charter, have constructed at least fifty miles per year, and should have completed the whole road by July 1, 1878. But it did nothing. After this long inaction of nine years and its practical abandonment of the work, *the company was not in a position to demand of the Government a strict and literal performance of its obligations when it had so completely failed to meet its own.* While the reservation of some of these lands for the benefit of the Indian tribes might not have been consistent with its obligations to extinguish Indian titles; if the company has been prosecuting its work according to its contract, *we do not think that it is entitled to complain that the Government did not deal with it precisely as if it lived up to its undertaking.* [Italics added.]

In like manner the claim of the company in the instant case does not rest on "strict right." The lands which were received by the company after its defaults in performance occurred were received as a "matter of favor." Having violated its contract, the company is not entitled to performance "precisely as if it lived up to its undertaking." The "favor" of the United States with respect to the withdrawn forest reserve lands terminated when those lands were withdrawn, and all further "favors" on the part of the United States were suspended by the Resolution of June 5, 1924, forbidding the issuance of any further patents pending an investigation, and, following such investigation, were completely terminated by the refusal to make further conveyances which is embodied in the forfeiture provision of the Act of 1929.

It remains now to establish the substantiality of the company's breaches of contract.

B. THE COMPANY'S FAILURE TO COMPLETE THE MAIN LINE FROM WALLULA TO PORTLAND, AS REQUIRED BY THE RESOLUTION, WAS A SUBSTANTIAL BREACH[46]

The Act of July 2, 1864, defined the road to be constructed as "beginning at a point on Lake Superior, * * * thence westerly by the most eligible railroad route * * * to some point on Puget Sound, with a branch, via the Valley of the Columbia River, to a point at or near Portland, in the State of Oregon." The Joint Resolution of

[46] Assignments 9, 13, 23, and 29 (R. 652–55), *supra*, pp. 41–43, 45.

May 31, 1870, by authorizing the company to locate and construct "its main road to some point on Puget Sound, via the Valley of the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound," made the contemplated line to Portland the main line and the line across the Cascades the branch line. The repetition of the words "via the Valley of the Columbia River" emphasizes that the construction of that part of the road was deemed an essential part of the enterprise.

Section 8 of the Act of July 2, 1864 (App. 47) provided "That each and *every grant, right, and privilege* herein are so made and given to, and accepted by, said Northern Pacific Railroad Company, *upon and subject to the following conditions*, namely: That the said company * * * shall construct, equip, furnish, and *complete the whole road* by" July 4, 1876. [Italics added.] The time for completing the whole road was later extended to July 4, 1879. It expired on that date (R. 22, 264).

It is to be noted that the condition was not merely that the road should be finished by a stated date, but that the company must *complete the whole road.* After the Joint Resolution of 1870 reversed the locations of the main line and branch, this meant that the completion of the main line "via the Valley of the Columbia River" was an express

condition of the company's right to demand performance by the United States. Such completion was made of the essence of full performance by the express terms of the law.

The company never did complete the road. The last construction was in 1887. The failure of the company to construct, or even to make any definite location of, the required main line of the road via the Valley of the Columbia River, a distance of 225 miles between Wallula, Washington, and Portland, Oregon, was alleged in subdivisions XIV (R. 23) and XXVI (R. 49) of the bill as a defense to the company's claim for additional compensation. The company admitted in its answer (R. 191, 220) that it had neither definitely located nor built this portion of the main line. Yet the master struck these subdivisions from the bill, and the court approved his action.

The effect of the ruling below is to hold that although the company has admittedly failed to perform an express condition of the grant, it is none the less entitled to compensation from the United States, based on the proposition that the United States in retaining indemnity lands for the forest reserves has failed to perform an executory obligation to permit the company to select such lands. Such a ruling is obviously error, as we shall demonstrate in detail below. The company's breach here was substantial and went to the essence. It therefore necessarily absolved the United States from any duty of further performance.

1. *The company's breach wholly defeated the essential object of the grant*

By reason of the company's failure to complete the road, the United States did not get a direct road to Portland with its coincident land-grant advantages. It did get a land-grant road from Lake Superior to Puget Sound via Pasco, Washington, and from Portland to Puget Sound. It also got a land grant road extending from Pasco to Wallula, Washington (population 300 in 1930), a distance of approximately fourteen miles for which it has paid in public lands several hundred thousand acres.[47] Because of the company's failure to extend this fourteen-mile sector of the road on to Portland, the sector has no value to the United States as a land-grant road. It certainly cannot be supposed that the United States would have aided that portion knowing that it would not be completed as a land-grant road to Portland.

Congress never intended to give any land grant for a main line railroad from Lake Superior to Wallula, Washington. A direct land-grant railroad through from Lake Superior to Portland was the essential object of the gift.

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[47] Since the road here was in a Territory, the area of the odd-numbered sections opposite each mile of road was 25,600 acres, or a total of 358,000 acres for the fourteen miles. The record does not show how much of this acreage was obtained by the company, but it seems reasonable to assume that it received the major portion of it.

Before the company began to build and before it even filed a map of general location, Congress had said that if the company would build a main line from Lake Superior to Portland and thence to Puget Sound, with a branch from the main line to Puget Sound, the company could have this single huge grant of public lands.

Portland was of importance in the project as a Pacific port. The company knew this and repeatedly made use of it with Congress. The first formal report of the company, S. Misc. Doc. No. 9, 40th Cong., 2d sess. (1867), pointed out the industrial, political, and military advantages of these two tidewater outlets. Included was the report of the Engineer-in-Chief of the Railroad, expressing the contemporaneous views of the importance of both outlets (p. 38): "In a memoir on this subject published in 1853, to which reference is made for many important facts and statements bearing upon this subject (statements the more valuable because given without prejudice or bias in favor of any particular route for the road), I ventured the opinion that 'upon the Columbia or upon the waters of de Fuca will yet arise the Queen City of the Pacific. Wherever that emporium is to be, whether at the mouth of the noble Columbia, or on one of the beautiful bays that open out upon the Strait of de Fuca, a high destiny awaits it.' Subsequent investigations, and a more accurate knowledge of the entire country, strengthen the

conviction of the correctness of this opinion. Governor Stevens states that the waters of Puget Sound form 'a great inland sea, unsurpassed on the shores of all the oceans for the purposes of commerce'; that 'these waters, in connection with those of the Columbia and the main coast of the Pacific ocean north of the Columbia, and the adjacent country, are a second New England, having all the elements for a great variety of pursuits, and for a most extensive commerce.'"

Congress designated the route by way of the Columbia River to Portland for the main line. It knew the anticipated benefits of that line and that terminus, including their industrial and military advantages. They far exceeded any advantage of a railroad to Wallula, or of the roundabout route over the Cascade Mountains via Tacoma, or of a direct route to Portland over, in part, a road not subject to land-grant rates.

The result is that the United States has not received, for the land already conveyed, what it expressly required in return for the grant. For this breach of the company's obligation, which very obviously frustrated the public policy of the grant, the United States is not seeking to recover a cent of damages or a square foot of land. It is setting up that breach as a defense to a claim for compensation arising out of an alleged breach of its own contract. Yet the ruling of the court below wholly ignores the company's breach and requires the

United States to pay damages for a purported breach of the same agreement.

The company contended, at the first argument, that it is continuing to perform its obligations, and that the United States is receiving the benefit thereof; the performance consisting of the continued carriage of troops, mails, and munitions of war at land-grant rates. But this contention wholly overlooks the established rule that the obligation to accept traffic at land-grant rates attaches to the road because it was land aided, regardless of the extent of such aid. *Grand Trunk Western Ry. Co.* v. *United States,* 252 U. S. 112; *Chicago &c. Ry. Co.* v. *United States,* 217 U. S. 180.

2. The company cannot be relieved from this breach of condition

As has been shown, p. 125, *supra,* the grant to the company was made upon condition that it complete the whole road. Breach of that condition excuses the United States from any duty to make any conveyances whatever. 3 Williston, *Contracts* (Rev. Ed.) § 675, and other authorities cited at p. 114, *supra.*

But the company has argued that it loses no rights by reason of its admitted failure to complete the road, citing *Schulenberg* v. *Harriman,* 21 Wall. 44, and *Van Wyck* v. *Knevals,* 106 U. S. 360. Those authorities, however, simply hold that a third party cannot take advantage of the railroad's noncompletion, and that a forfeiture consequent upon non-

completion "can be asserted only by the grantor, the United States, through judicial proceedings, or through the action of Congress. *Schulenberg* v. *Harriman,* 21 Wall. 44." 106 U. S. at 369. The cases cited defeat rather than support the company's contention, because here a forfeiture has been asserted by the grantor.

The requirement of Section 8 of the 1864 Act that the whole road be completed is stated in the unmistakable language of an express condition: "every grant" is made "upon and subject to the following conditions * * *." The courts have no option but to enforce it. The applicable principle here is that set out in Restatement of Contracts, § 258, Comment (b):

> An intention that a promise shall be conditional on the occurrence of an act or an event may be manifested with varying degrees of clearness. When expressed in unmistakable language, the hardship caused by enforcing the requirement is generally immaterial.

See *United States* v. *San Francisco,* 310 U. S. 16; *Columbus* v. *Mercantile Trust Co.,* 218 U. S. 645, 663.

Actually, however, there is no hardship to the company here if the present point is decided adversely to its contentions. It has already received nearly 40,000,000 acres of land, an area about equal to that of the six New England States. The value of this immense area is over three times the cost of constructing the road (R. 36, 200). Not only

figuratively, but literally, this railroad was built by the United States. The United States is not asking, as a consequence of the company's failure to complete the road, that the company lose or return anything it has received. The United States simply contends that, by reason of the company's admitted failure to comply with this express condition of the grant, it has forfeited its right, at law or in equity, to receive further lands or any indemnity in lieu thereof.

3. The failure to complete the road has not been waived

This involves questions which have already been discussed herein.

The master approached the present point as if the United States were attempting to get back lands to which the title had passed to the company subject to a condition subsequent (R. 287, 383). As shown in Point I (A) above, p. 66, the forfeiture declared by the 1929 Act did not affect vested titles at all, and went only to executory claims.

This same fallacy underlies the master's discussion of the Acts of Congress from which he deduces a waiver of the right to declare a forfeiture (R. 385). As we have pointed out (see Point II (B), *supra*, pp. 86–91, and Appendix D, *infra*, pp. 281–95), none of the acts in question dealt with a refusal to perform, none amounted to a waiver, and several of them expressly disclaimed any intention of waiving anything.

The company here did not do or fail to do anything in reliance on the Government's forbearance. Its last construction was in 1887. Since then it has not changed its position in any respect. The acceptance of selection lists by the officers of the United States at a time when they might have refused to do so because of the broken conditions did not mislead the company to its disadvantage.

Nor, as has been seen, was the United States required to assign reasons for its nonperformance when, between 1898 and 1907, it withdrew the indemnity lands for the forest reserves (R. 608–15). It is enough that the reasons were there. (See Point III (A), *supra*, pp. 119–22.)

4. This point can be disposed of without a retrial

The United States specially requested the court below to conclude from the facts admitted by the pleadings that because of such breaches the withdrawals involved in this case were and are valid (R. 584). The court's refusal so to conclude was assigned as error (Assignments 23 and 29, R. 654–55). If these assignments should be sustained no further trial on this phase of the case would be required, for the facts are uncontroverted.

C. THE COMPANY'S VIOLATION OF THE $2.50 PER ACRE SALES AND PREEMPTION PROVISO WAS A SUBSTANTIAL BREACH[46]

The Act of 1864 contained, in Section 10 (App. 47–48), a prohibition against mortgaging the granted lands except with the consent of Congress.

[46] Assignments 7 and 8 (R. 652), *supra*, p. 41.

This consent, as we have pointed out, was given by the Joint Resolution of 1870. That Resolution contained two provisos dealing with the disposition of the granted lands, the first of which requires that "all lands hereby granted to said Company which shall not be sold or disposed of, or remain subject to the mortgage by this Act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and preemption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre."

The bill alleged (Subd. XIII, R. 22) that none of the lands in question were ever opened to settlement and preemption by the company, but that on the contrary, large acreages of the said lands were sold by the company to such persons and under such prices and conditions as suited its pleasure. The company's answer admitted these allegations (R. 190), but moved to strike them out (R. 154). The master recommended that the subdivision be stricken (R. 371–78), and the court below followed his recommendation (R. 411–12).

The master's position was that the preemption clause applied only to lands in the primary and first indemnity limits opposite the line from Portland to Tacoma, and to second indemnity limits everywhere else; that lands under mortgage were exempt from its provisions; that the company had a right to execute as many mortgages on its prop-

erty as it pleased, and that the United States had waived its right to object to the issuance of subsequent mortgages; that in any event the railroad had no duty to perform in respect of preemption and might continue to hold its lands; and that therefore there was no violation of the proviso in question (R. 371–78).

1. The sale and preemption proviso expressed an important public policy which the courts will enforce

That the proviso here in question was expressive of a fundamental public policy cannot be controverted. The policy of disposing of the public lands to settlers in limited quantities suited to their needs had been fully established and reflected in the public land laws prior to the date of the Northern Pacific grant. Then, during the years 1866 to 1868, there came to notice the irregularities which had accompanied the land grant to the Union Pacific Railroad Company.[49] As a result, there arose an insistent demand for restrictions on the disposition of lands granted to railroads in order to prevent the creation of enormous mortmains for speculative purposes, and to put such lands in the hands of settlers. Congress was not unresponsive to the public feeling, with the result that beginning with the year 1869 the policy of imposing restrictions upon the disposition of granted lands was reflected

[49] See Haney, *A Congressional History of Railways in the United States, 1850–87*, pp. 81–82.

in amendments to pending bills and in new land-grant legislation."[80]

On January 19, 1869, three amendments to the Denver Pacific Bill were proposed, each designed to prevent abuses in the disposition of granted lands and to require that such lands be disposed of, to settlers, in limited quantities (Cong. Globe, 40th Cong., 3d Sess., pp. 462–63). An amendment requiring sales to actual settlers in 160-acre tracts at $2.50 per acre was adopted.

Thereafter (up to March 3, 1871, the date of the last railroad land grant) nearly every bill granting lands to aid in the construction of internal improvements or reviving grants previously made, if it did not already contain such a proviso, was amended to contain restrictions upon the disposition of the granted lands. A large number of such

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[80] The feeling of the public was accurately reflected by Congressman Washburne, of Illinois, in an address on the Denver Pacific Bill on January 19, 1869 (sixteen months prior to the passage of the Resolution of May 31, 1870). He said (Cong. Globe, 40th Cong., 3d Sess., p. 463):

"When you contemplate the vast power of these nonresident landholders, the overshadowing land monopoly created, the evils and oppressions always connected therewith, we must all be filled with amazement at the reckless and shameless legislation of Congress on this subject. * * * I voted for some of the earlier bills. But when I saw the use that was being made of these grants, the brazen greed of speculators who obtained possession of them to use for their own interests regardless of the public interests; * * * my views in regard to the whole policy of land grants were very materially modified."

measures [51] either containing restrictive provisions in the original draft of the bill or amended to contain such restrictions were before Congress [52] when the Joint Resolution of 1870 was under consideration.

This change of policy has been recognized by this Court. See *Oregon & California R. R. Co.* v. *United States,* 238 U. S. 393, 416, where it was said:

> In the first grants to railroads there were no restrictions upon the disposition of the

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[51] Congressman Holman stated that more than ninety bills making land grants in aid of public improvements were introduced, prior to April 1, 1870, in the 41st Congress (Cong. Globe, 41st Cong., 2d sess., p. 2362).

[52] That the general policy had the approval of both houses of Congress was stated by Congressman Julian, Chairman of the Public Lands Committee, in proposing an amendment to the Coos Bay Grant requiring that the granted lands be disposed of to actual settlers, in tracts not exceeding 160 acres and at prices not exceeding $2.50 per acre. He said (Cong. Globe, 40th Cong., 3d sess., p. 1821):

"Mr. Speaker, the amendment which has been read by the clerk is a provision which ought to be applied to every future grant of land and to every dead grant that seeks a revival at our hands. * * * The adoption of the amendment will not defeat the passage of the bill, for the Senate, like the House, has repeatedly approved of the very condition prescribed in the amendment."

See 40th Cong., 3d sess., H. B. 1998, 1901; S. B. 349, vol. 3, 570, vol. 4, 41st Cong., 1st sess., H. B. 393; S. B. 107, vol. 1; 41st Cong., 2d sess., H. B. 580, 678, 882, 1082, 1312, 1515, 1590, 1756, 1830, 1874, 1877, 2056, 2157, 2274, 2399; S. B. 396, vol. 3, 268, vol. 2, 168, vol. 2, 566, vol. 4, 55, vol. 1, 1011, vol. 7, 41st Cong., 3d sess., S. B. 483, vol. 3, 42nd Cong., 1st sess., H. B. 59, 128, 137, 138, 261, 317, 371, 370. Of course, a great many of these bills failed of passage.

lands. They were given as aids to enterprises of great magnitude and uncertain success and which might not have succeeded under a restrictive or qualified aid. However, a change of times and conditions brought a change in policy, and while there was a definite and distinct purpose to aid the building of other railroads, there was also the purpose to restrict the sale of the granted lands to actual settlers.

While the language of the proviso now under consideration does not in terms require sale to actual settlers, as did some of the other acts, it did require that the lands be made "subject to settlement and preemption like other lands," the purpose of which was to put them in the possession of actual settlers. The proviso became part of the company's contract, and the company thereupon became obligated to perform the condition and thus to effectuate the policy. The policy reflected in the proviso was an important, if not controlling, consideration in making the grant. Failure to comply with the terms of the proviso was a substantial breach of the contract, warranting forfeiture of the company's claims and an accounting for excess values received.[53] These propositions were settled by this Court in the Oregon and California litigation. *Oregon & California*

[53] The company's obligation to account for sums received in excess of $2.50 an acre, is discussed under Point IV (A) below, pp. 201–04.

R. R. Co. v. *United States,* 238 U. S. 393, 243 U. S. 549.

Because of the significance of those decisions, it seems worth while to review briefly the facts out of which they arose.

By the Act of April 10, 1869, c. 27, 16 Stat. 47, Congress amended an earlier land grant, made in 1866, in aid of the Oregon and California Railroad Company. The amendment required that the lands granted in 1866 "shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding $2.50 per acre." This proviso was violated.

Thereupon, by the Joint Resolution of April 30, 1908, No. 18, 35 Stat. 571, Congress directed the Attorney General to institute and carry on such suit or suits as he deemed necessary to protect the interests of the United States. Suit was filed in an attempt to enforce a common law forfeiture of such of the lands granted to the company as remained unsold, whereupon a question was raised as to the power of the Attorney General to attempt to enforce the forfeiture without a previous declaration of forfeiture by Congress. H. Rep. 1008, 62d Cong., 2d Sess. (1912). Thereupon Congress passed the Act of August 20, 1912, c. 311, 37 Stat. 320, declaring that all claims of forfeiture which had been asserted by the Attorney General in the suit "are hereby, ratified and confirmed and are hereby declared to be of the same force and effect as declarations of forfeiture by the Congress * * *."

After an adverse decree below, the railroad company appealed to this Court, which held that the language of the proviso was an enforceable covenant. *Oregon & California R. R. Co.* v. *United States,* 238 U. S. 393. In view of the changed conditions, however, the cause was remanded with instructions (p. 438) that Congress be accorded an opportunity to provide by legislation for the disposition of the lands "in accordance with such policy as it may deem fitting under the circumstances and at the same time secure to the defendants all the value the granting acts conferred upon the railroads." Congress thereupon passed the Chamberlain-Ferris Act of June 9, 1916, c. 137, 39 Stat. 218, revesting all such unsold lands and providing a procedure for the disposition of the lands and payment to the company of its interest in them. Of the proceeds of sales, the company was to receive credit for the equivalent of $2.50 an acre for the entire grant; it was required to account to the United States for any excess. The validity of that act was upheld in *Oregon and California R. R. Co.* v. *United States,* 243 U. S. 549.[54]

While the proviso involved here is not *in haec verba* with the one considered in the Oregon and California litigation, it is not different in substance. "Subject to settlement and preemption like other lands" necessarily implies sales to actual

[54] For the final accounting, see *United States* v. *Oregon and California R. R. Co.*, 8 F. (2d) 645.

settlers; other public lands were open, for settlement and preemption, only to actual settlers. It is significant that the title of the original homestead law was "An act to secure homesteads to actual settlers on the public domain," Act of May 20, 1862, c. LXXV, 12 Stat. 392, and that the preemption law of June 22, 1838, c. CXIX, 5 Stat. 251, "An act to grant preemption rights to settlers on public lands," begins with the words, "Every actual settler." See *United States* v. *Oregon & California R. R. Co.*, 186 Fed. 861, 911–14. The difference in language does not here imply a difference in legislative purpose, *cf. United States* v. *Dickerson*, 310 U. S. 554, for the public policy which prompted the enactment of the two provisos was the same. The same reasons which led this Court to enforce that policy in the *Oregon & California* case require that it be enforced here.

The company's breach was material. It thwarted an important legislative policy with respect to the disposition of the public domain. We submit that it disentitles the company to receive further performance from the United States.

2. The proviso is applicable to the primary and indemnity belts along the entire line of the road

The proviso of the Joint Resolution of 1870 now under consideration was made applicable to "lands hereby granted." The master was of the opinion that this limited its force to those additional lands

made available by the Resolution, namely, primary and first indemnity limits along the line from Portland to Tacoma, second indemnity limits everywhere else, and no more (R. 372–73).

Conceivably "lands hereby granted" might be more restrictive still, and mean only lands granted *in praesenti*—that is, place lands only and not indemnity lands.

But we believe that neither of these restrictive interpretations is correct, and that the true purpose of Congress was to include in the phrase "lands hereby granted" all lands along all portions of the road, within primary and indemnity limits alike. This view is supported by authority. *Northern Pac. R. R. Co.* v. *United States,* 36 Fed. 282 (C. C. D. Minn.). That case enunciates the correct principle that while "lands granted" ordinarily refers to place lands, the expression has a double meaning and frequently includes "all land donated by the Government, whether lands in place or indemnity lands." The court held (p. 287) that in this very Resolution the term refers to "all the lands which had passed to the Company, whether lands in place or indemnity lands."

The master did not doubt that indemnity lands, as such, were included (R. 373);[55] and *Hewitt* v.

[55] His interpretation in this respect is supported by the remarks made by Senator Howard, in charge of the bill (Cong. Globe, 41st Cong., 2d Sess., p. 2492):

"There will also be some additional sections granted to the company by this resolution. For instance, where there is found to be a deficiency of the original alternate sections,

Schultz, 180 U. S. 139, relied upon by the company, is not to the contrary. That did not deal with the present proviso at all. It merely holds that, for the purpose of withdrawing lands from the operation of the preemption laws, for the benefit of the railroad, the phrase "lands hereby granted" in Section 6 of the 1864 Act (App. 43–44) refers only to place lands, granted *in praesenti,* and not to lands in the indemnity limits. While the language of the two provisos may be the same, their purposes are markedly different. Congress plainly did not intend to withdraw lands from settlement except as they were granted *in praesenti.* Equally plainly, it would want the $2.50 limitation applicable to all lands which passed to the company.

Where the master erred was in interpreting "hereby granted" in the proviso so as to exclude lands which might have been earned under the Act of 1864 had the Joint Resolution of 1870 never been passed (R. 372–73). This interpretation entirely overlooks the circumstance that the Resolution did not simply provide second indemnity limits and a line from Portland to Puget Sound.

None of the lines had been constructed by 1870 when the Resolution was passed. The natural in-

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as where they have been taken up by homestead settlers, or otherwise disposed of by the government of the United States, then the company will have the right, according to this resolution, to select other sections for the purpose of supplying this deficiency, although the new sections may not lie within the range of the original alternate sections of land granted by the charter."

ference is that Congress was thinking and speaking of the whole system as then authorized in 1870. This inference is supported by the use of the same phrase occurring later in the Resolution, in the clause "mortgaged lands hereby granted." The latter expression obviously embraces all the lands to which the railroad lays claim, since the mortgage authorized by the Resolution was intended to cover all of the company's lands.

Moreover, the Resolution authorized entirely new main and branch lines, with a corresponding grant of lands for the new route. It provided for a main line from Lake Superior to Puget Sound via the Columbia Valley with a branch *from some convenient point on the main line to Puget Sound,* in place of a main line from Lake Superior to Puget Sound and a branch line *from some point within 300 miles of its western terminus* to Portland via the Valley of the Columbia provided for in the Act.

The correctness of the construction here urged by the United States is emphasized by the debates in Congress, which leave no substantial doubt that the proviso requiring the company's lands to be open to preemption and settlement was intended to cover all its lands, and that it was a concession wrested from the proponents of the Resolution.[56]

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[56] While the Resolution in the form in which it was passed contained the amendment offered by Senator Scott under a rule forbidding discussion (Cong. Globe, 41st Cong., 2d Sess., p. 2868), the events immediately preceding its pas-

It should be noted here that, even on the more limited construction of the proviso which the master adopted, the company's breaches of the requirements as to settlement and preemption are still very substantial.[57]

3. The proviso is applicable to mortgaged lands

But the master went on to hold that the proviso did not apply to mortgaged lands (R. 373–78).

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sage are revealing. In amendments proposed by various senators containing terms not acceptable to the proponents of the measure, the phrase appears as "lands granted by this Resolution." The sponsors of those amendments spoke of the restrictions imposed as applicable to the entire acreage which the railroad would acquire. See p. 2845 for Senator Howell's remarks; p. 2846 for Senator Casserly's and Senator Thurman's; also Cong. Globe, 41st Cong., 2d Sess., App. p. 307 for remarks by Senator Casserly. Shortly thereafter, Senator Scott offered his amendment containing the same terminology; this was accepted, those who then opposed the Resolution voting for its adoption (p. 2869). If the narrower phrase "lands granted by the Resolution" was intended to include all lands granted the company, *a fortiori* the language finally adopted, "lands hereby granted," has as wide a scope.

It is true that, as the debates cited by the company show, prior to the day before the adoption of the Resolution, the amendments and discussion indicated a tendency to limit the lands to be opened to settlement. But any inference to be drawn from this is overborne by the close proximity of the passage of the amendment to the debates in which the discussion disclosed that by the term "hereby granted" the proponents of the amendments meant all the lands.

[57] The company received, in the grant of 1870 and the second indemnity limits of the grant of 1864, a total of approximately 3,413,000 acres (unprinted Govt. Exhs. 103 and 210).

Inasmuch as all the lands were mortgaged, this reasoning has the effect of completely nullifying the proviso.

He reached this conclusion because the $2.50 proviso was applicable to "all lands hereby granted to said company which shall not be sold or disposed of, or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road."

We contend that the proviso affects all lands still subject to the mortgage on July 4, 1884, five years after the date fixed for completion of the road. To hold otherwise, as did the master and the court below, is to nullify the proviso and to disregard completely the legislative purpose.

Admittedly the language used is inartistic. The difficulty is not lessened even when resort to the original Resolution on file shows that a comma appears between the clause "sold or disposed of" and the clause "or remain subject to the mortgage."[58] The meaning of the latter clause is still unclear. Does it mean "or *which* remain subject to the mortgage" as we contend? Or is the true meaning that urged by the company, "or *which shall not* remain subject to the mortgage"? Eminent grammarians have been unable to resolve the ambiguity.[59]

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[58] See J. C. R. 4450–51. The comma is omitted in the Resolution as it appears in 16 Stat. at 379.

[59] See the memorandum by Professors Nettleton and Brooke of the English Department of Yale University, J. C. R. 2760–61, and the remarks of the legislative draftsman of the House, J. C. R. 2782–85.

We turn for enlightenment, therefore, to the legislative history of the proviso, and that makes it clear that the construction we urge is the proper one.

The Resolution as introduced had no preemption clause, and no "or remain subject to the mortgage" clause. The opponents of that provision of the Resolution which permitted a mortgage feared both monopoly and mortmain, and wished to insert amendments leading to sale and settlement of the lands. Their efforts were spurred by the realization that, if a mortgage were allowed, there would be no economic compulsion on the company to sell the land to settlers and thus raise capital.[60]

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[60] This viewpoint was forcefully set forth by Senator Howell (Cong. Globe, 41st Cong., 2d Sess., p. 2578):

"* * * Then (some years ago) railroad companies were anxious to get rid of their lands as rapidly as they could at any reasonable price; and they did get rid of them. They did not remain as an immense and overshadowing monopoly, like the upas tree, to curse the earth upon which they were located. But now things have changed. The railroad companies control the country, and railroad companies control the capital of the country. They can combine any amount of capital that they see fit to combine. *They can mortgage these lands, and with the money obtained upon the mortgage of the lands, with the capital they can concentrate they can hold on to the lands for fifty years, while side by side the lands not granted to the company are settled on by settlers, and these companies hold on to their lands until they grow to be valuable, immensely valuable;* valuable not only by the railroad being built, but far more valuable by the settlements that are made adjoining them on the alternate sections by the capital and the labor of the men who settle there, and who develop the interests of the

The first attempt to have the Resolution amended was by the insertion of a provision that the lands could be sold only to actual settlers at $2.50 per acre (Cong. Globe, 41st Cong., 2d Sess., p. 1626). These provisions contemplated immediate sale. When they were rejected, the proponents of the amendment advocated a provision that would delay for three years the opening of the lands for settlement (p. 2845). Successive proposed amendments delaying the time still further gained increased adherents (p. 2846). Both sides were assuming, as to all the predecessors of the proviso finally adopted, that the $2.50 provision applied to mortgaged land.[61] That the proponents of the Resolution were won over to this way of thinking is evidenced by the adoption the next day of the Scott amendment, which set out the language

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country, and who have no aid or comfort from these railroad sections in doing these things.

"*Therefore, a reason exists now that did not exist then for taking measures to guard against these railroad monopolies of land to the prevention of settlement and improvement and to the oppression of the people who settle along the line of railroads.* That is the principle upon which I go in regard to that matter. I think it is sound, I think it is reasonable. I think there is good ground for it, and no man who will think it all over can help coming to that conclusion." [Italics added.]

[61] See the remarks of the proponents of the Resolution, Senator Howard (pp. 2845, 2846, 2492–2493), Senator Stewart (p. 2482), Senator Corbett (p. 2573); and of those opposed, Senator Howell (pp. 2480, 2481, 2578), Senator Thurman (p. 2571), Senator Casserly (pp. 2845, 2846).

now under consideration in its final form (pp. 2868–69).

In short, the legislative debates show that a compromise was reached between those who feared that a mortgage would permit the keeping of the land, and those who were apprehensive that a settlers' clause would destroy the land security. The mortgage security was to be preserved by delaying the opening of the land to settlement for five years after the completion of the road and by giving the railroad the power during this period to sell the lands at the best price possible. But thereafter it was made explicit that all the lands not sold and which remained subject to the mortgage were to be open to preemption, thus ensuring that the mortgage would not operate to permit retention of the land and thus to defeat the purpose of encouraging settlement.

Platt v. *Union Pacific R. R. Co.*, 99 U. S. 48, on which the company here relied, is not to the contrary. That case involved Section 3 of the Union Pacific granting Act of July 1, 1862, c. CXX, 12 Stat. 489, 492, which provid d as follows:

> And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and preemption, like other lands, at a price not exceeding $1.25 per acre to be paid to said company.

It was held, over strong dissent (Bradley, Clifford, and Miller, JJ.), that the words "disposed of by the company" included a mortgage, and—relying on the supposed intention of Congress—that the mortgage was superior to the preemption right.

That decision cannot be regarded as controlling here, for the proviso in the Joint Resolution of 1870 is significantly different. First, there is the presence of the phrase, "or remain subject to the mortgage," which makes explicit that the lands which remain subject to the mortgage shall be subject to settlement. This added clause alone makes the *Platt* case wholly inapplicable here.

Further, there is the existence of an additional proviso in the 1870 Resolution calling, in the event of foreclosure of the mortgage, for sale of the lands in individual sections in the States or Territories where situated. The two provisos together indicate a scheme against monopoly: the lands are to be sold to settlers while the mortgage is on the land; and, on foreclosure, to individuals, section by section.

As we have already pointed out, pp. 135–38 above, and as this Court has recognized, *Oregon & California R. R. Co.* v. *United States*, 238 U. S. 393, 416, there had been a marked shift in public policy between 1862 and 1870. That shift was reflected in the clause, "or remain subject to the mortgage," which appeared in Northern Pacific Joint Resolution but not in the Union Pacific Act. That

clause, we submit, must be given some meaning, particularly in the light of the dominant public purpose reflected by the debates.

If the company's construction is adopted, then the effect is to nullify the proviso, and to turn the legislative compromise into an abject surrender. That no such surrender was contemplated appears not only from the debates but also from the circumstance that the mortgage which was executed pursuant to the authority conferred by the Joint Resolution covered after-acquired property (Exhibit E [attached to the bill but not printed] at p. 5), and permitted sales of the property subject thereto (*Id.*, at p. 10). In these circumstances it seems plain that application of the proviso could not impair the mortgage security. Accordingly, the construction urged by the United States, which carries out the purpose of Congress without impairing any right of the mortgagees or hindering the financing of the road, is assuredly the correct one.

The legislative history here discloses a studied purpose to avoid the result which was later reached in the *Platt* case. While the language here is not identical with that involved in the *Oregon & California* cases, the background of the legislation shows that the dominant purpose was the same. Cf. *United States* v. *Dickerson*, 310 U. S. 554. Any ambiguity in language must be construed against the company, under the familiar principle that grants of privileges and franchises must be

construed against the grantee and in favor of the public. *Barden* v. *Northern Pac. R. R. Co.*, 154 U. S. 288, 325–26; *Southern Pac. Co.* v. *United States*, 307 U. S. 393, 401; *Central Transp. Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 24, 49; *Dubuque & Pac. R. R. Co.* v. *Litchfield*, 23 How. 66, 88–89. The inevitable conclusion is that the controlling precedent here is found in the *Oregon & California* cases, and that the same public policy which was upheld there should likewise be enforced here.

4. In any event, the Joint Resolution of 1870 authorized only one mortgage, which, when foreclosed, rendered the lands free from mortgage and subject to preemption

But even if land lawfully under mortgage was not within the proviso, there is still a compelling reason why the Northern Pacific lands were subject to preemption. The Joint Resolution of 1870 authorized only one mortgage, and that was foreclosed in 1875. When, after that time, the company retained the lands, they were subject to preemption and settlement after 1884.[62] See *Oregon & California R. R. Co.* v. *United States*, 238 U. S. 393, 435.

That only one mortgage was authorized can be ascertained both from the language of the Resolution and from its legislative history.

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[62] Five years after the date fixed for completion of the road.

Every reference to the mortgage is in the singular. It appears five times as a noun and twice as a pronoun: "secure the same by *mortgage*"; "proof and notice of *its* legal execution"; "said *mortgage* shall be filed"; "or remain subject to *the mortgage* by this act authorized"; "if *the mortgage* hereby authorized"; "the trustees to whom such *mortgage* may be executed"; "either at *its* maturity." This would seem to establish that only one mortgage was authorized. *First Nat'l Bank* v. *Missouri*, 263 U. S. 640, 657; *Garrigus et al.* v. *Board of Commr's of Parke County*, 39 Ind. 66, 70.

If the language, particularly that of the proviso, did not indicate beyond doubt that only one mortgage was authorized, the statutory background and purpose of the Resolution would be conclusive.

Section 10 of the Act of 1864 expressly forbade any mortgage. It was intended that the road should be financed by the sale of lands and of stock. When a mortgage was proposed in 1870 as an alternative method of financing, fears were expressed that it would create a monopoly and allow the withholding of land from settlers. First, there would be no incentive to secure purchasers for the land (Senator Howell, Cong. Globe, 41st Cong., 2d Sess p. 2578); second, there would be the probability of a default, resulting in foreclosure and sale to a ring (Senator Thurman, p. 2570). Naturally therefore, the relief from the former absolute prohibition must be narrowly and strictly con-

strued, and it cannot be supposed that Congress intended more than one mortgage. In fact, if the effect of one mortgage was to tie up the lands for its duration, surely several would not have been authorized in view of the paramount objection that successive mortgages would block the opening of the Northwest from settlement. The preemption clause has no meaning if it can be evaded by mortgage succeeding mortgage.

Besides, Congress had only one particular mortgage in mind and the legislation must be considered a special act of limited scope. Jay Cooke had had his engineer make a survey of the Northern Pacific route. The engineer estimated that it would cost $85,277,000. Smalley's History of the Northern Pacific Railroad, p. 155. On the basis of 2,500 miles of railroad and $50,000 worth of bonds per mile, only one mortgage was needed. (Exhibit E [attached to the bill but not printed]; R. 13.)

In sum, only one mortgage was authorized. When that mortgage was foreclosed, the authority to mortgage granted by the Resolution expired, and the company was once more subject to the prohibitions of Section 10 of the 1864 Act. Consequently, if the land was retained by the company in 1884 free of the only mortgage ever authorized by Congress, it should have been open to preemption and settlement.

It is our contention that the company was permitted to sell the land as it pleased prior to the expiration of five years after the completion of the

road, but that after that time it was to open all lands to preemption and settlement at a price not to exceed $2.50 per acre. At any rate, it was to do nothing inconsistent with that provision. For, as was said in the first *Oregon & California case* (238 U. S. at 421), "If the language may be said not to impose 'an affirmative obligation to people the country' it certainly imposes an obligation not to violate the limitations and prohibitions when sales were made."

The United States is not barred by either acquiescence or waiver from questioning the later mortgages in this connection. Neither continued breach nor notice thereof to Congress is sufficient to supply a want of statutory authority. *United States* v. *Southern Pac. Co.*, 259 U. S. 214, 234. See *supra*, pp. 84–85. The provisions of the Joint Resolution of 1870 were operative and obligatory upon the company, until and unless repealed. *Oregon & California R. R. Co.* v. *United States*, 238 U. S. 393, 427. "Illegality cannot attain legitimacy through practice." *Inland Waterways Corp.* v. *Young*, 309 U. S. 517, 524.

5. At the very least, the company was under a duty to sell to settlers upon request

But even if it should be held that the company was free to dispose of its lands to persons other than settlers, we contend that, at the very least, the company was obligated to make sales to settlers who requested to buy, even though it might con-

temporaneously sell other land not settled upon. It did not do so.

This duty to make sales devolved on the company and was not one to be performed by the Department of the Interior. Not only does the statute require that the money be paid to the company, but the Secretary of the Interior held, in *Heath* v. *Northern Pacific Ry. Co.*, 38 L. D. 77, 82, 83, a case involving the company's refusal to sell on request, that the Department was not authorized to issue rules and regulations providing for sale of the land in the absence of specific legislation.

Moreover, when Judge Wolverton, at the trial of the *Oregon & California* case below, was discussing the nature of the obligation imposed by the clause there in question, he came to the conclusion that the duty was that of the company. He said (186 Fed. 861, 916):

> Having thus withdrawn these lands from the public domain, and from sale and disposal through the Land Department, and having granted them to the railroad company with a bare declaration that the grantee shall so sell the lands, without attempting in any way to prescribe the manner of sale, or to provide rules or regulations for the administration of the disposition of the grant, seems to me plainly to evidence an intendment that the *grantee should itself administer the disposal of the grant, and should proceed about it in its own way and manner.* [Italics added.]

Judge Wolverton fortified this conclusion by a reference to the legislative debates which revealed that more detailed amendments imposing duties on the Land Office had been rejected. 186 Fed. 861, 897, 898, 922. The instant proviso was similarly preceded by the proposal of more detailed amendments giving the Department of the Interior specific powers. (Cong. Globe, 41st Cong., 2d Sess., pp. 2842, 2843, 2844.) And the interpretation is likewise warranted that "the grantee company was liberated of all governmental control over the administration of the grant and was left free to dispose of the lands in its own way, in pursuance of the terms of the amendment." *United States* v. *Oregon & California R. R. Co.*, 186 Fed. 861, 922.

Nor would the imposition of the duty in the instant case be any more difficult than this Court found the duties imposed there. *Oregon & California R. R. Co.* v. *United States*, 238 U. S. 393, 420, 421. If there were obstacles and infirmities in the proviso, "they were but promptings and reasons for an appeal to Congress to relax the law; they were neither cause nor justification for violating it." *Id.*, at 423. The company owed not only the obligation to perform the proviso as a covenant in a contract but the obligation to respect and perform it as an exaction in a law. *Id.*, at 427.

The law here in question has not been repealed. Indeed, Congress in Section 3 of the Act of June 25, 1929, re-emphasized its intention that the policy embodied therein should be preserved when it said

that the passage of that Act "shall not be construed as in anywise evidencing the purpose or intention of Congress to depart from the policy of the United States expressed in the Resolution of May 31, 1870, relative to the disposition of granted lands by said grantee, and the right is hereby reserved to the United States to, at any time, enact further legislation relating thereto."

To disregard the violation by the company of the settlement proviso "would be in effect to declare that covenants violated are the same as covenants performed—wrongs done the same as rights exercised—and, by confounding these essential distinctions, give to the transgression of the law what its observance is alone entitled to." *Oregon & California R. R. Co.* v. *United States*, 243 U. S. 549, 561–62.

Subdivision XIII should not have been stricken from the bill. The facts it sets out are admittedly true. They constitute a substantial breach of the contract by the company and disentitle the company to any further performance by the United States.

D. THE COMPANY'S DISREGARD OF THE PROVISIONS REGARDING FORECLOSURE SALES WAS A SUBSTANTIAL BREACH OF ITS CONTRACT[63]

In the Joint Resolution of 1870 there is included a proviso (App. 58–59) requiring that "if the mortgage hereby authorized shall at any time be

[63] Assignments 3, 4, 10, 11, and 30 (R. 652, 653, 655), *supra*, pp. 40, 42, 45–46.

enforced by foreclosure or other legal proceeding, or the mortgaged lands hereby granted, or any of them, be sold by the trustees to whom such mortgage may be executed, either at its maturity or for any failure or default of said company under the terms thereof, such lands shall be sold at public sale, at places within the States and Territories in which they shall be situate, after not less than sixty days' previous notice, in single sections or subdivisions thereof, to the highest and best bidder." This requirement appears immediately after the $2.50 settlement and preemption provision just discussed.

There were two foreclosure proceedings, one in 1875 in the federal Circuit Court for the Southern District of New York (R. 14), the other in 1896 in the federal Circuit Court for the Eastern District of Wisconsin (R. 28). Inasmuch as most of the questions here which arose from those proceedings are common to both, it seems more convenient to discuss the two together.

The bill alleged (Subd. IX, R. 13) that on July 1, 1870, the company mortgaged its granted lands and other property to secure the payment of an issue of bonds; that default was made and foreclosure proceedings were commenced; that on June 30, 1875, the bondholders adopted a plan of reorganization in fraud of the United States whereby through a friendly foreclosure proceeding in the Southern District of New York they procured the mortgaged lands for a reorganized company and

thus for the benefit of the stockholders and bondholders of the mortgagor company; that the United States was a party neither to the plan nor to the suit; that in pursuance of a consent decree which had been obtained by them, 838,852 acres of the granted lands were sold under collusive and colorable private sales, in larger areas than single sections, in New York City where none of the lands were located, and that the remainder of the approximately 8,000,000 acres which had not previously been sold were sold in a single body to the bondholders' committee for a pretended consideration of $100,000; and that such sale was made in New York where none of the lands was situated.[64] The bill proceeds to allege that the company thereby violated the express requirements of the

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[64] Subdivision IX also contained allegations (1) that there had been an attempted transfer of the federal franchise to the Northern Pacific Railroad Company, as reorganized, by the reorganization of 1875; (2) that the plan for the issue of preferred and common stock under the reorganization was illegal as a violation of the charter provisions that the common stock should be open to public subscription for $100 a share; and (3) that the reorganization plan contained a provision that the preferred stock should be convertible at par into lands.

As to (1), it is probably not now material whether or not the corporation that existed after 1875 succeeded to the federal franchise; at any rate, the point will not be urged here. The allegations comprised in (2) and (3) will be discussed below, pp. 174–83, under Point III (E). The allegations involved in (2) must be considered along with Subdivisions VII and VIII of the complaint, since breaches of the same provision of the 1864 Act are involved.

oint Resolution by selling at private sale and not "public sale," by not selling "to the highest and st bidder" since there was no bidding, by not sell- g the lands where situated, and by not selling in ngle sections or subdivisions thereof; and, fur- er, that there was a breach of the implied require- ent that the lands be sold to third persons.

The bill further alleged (Subd. XVIII, R. 28) at foreclosure proceedings were commenced in 93 in the Eastern District of Wisconsin to fore- ose three mortgages which had been placed on e granted lands or part of them following the reclosure proceedings in 1875; that by virtue of o consent decrees rendered in said cause in 1896 nder a reorganization scheme devised by commit- es of stockholders and bondholders and J. P. organ & Company, the mortgages were foreclosed nd the property passed to the Northern Pacific ailway Company, which was in effect a reorgani- tion of the Northern Pacific Railroad Company; at the United States was not a party to these pro- edings; that the lands were not sold under bona de sales to third persons as required by the pro- so, but were sold in pursuance of a plan designed transfer the lands to the Railway Company in feat of the public policy of the United States ex- ressed in the proviso; that thereafter the Railway ompany sold the lands at such times and places nd at such prices as suited its pleasure.

The court struck out both these subdivisions (R. 411–12) on the master's recommendation (R. 299–314, 378–83). The master's report, in so far as it deals with the 1875 reorganization, is principally concerned with the points then pressed as to the irregularities in that reorganization, and the status, as respects ownership of the federal franchise, of the Northern Pacific Railroad Company as reorganized in that year. Though the master did not deal specifically with the violation of the terms of the Joint Resolution, he recommended that Subdivision IX be stricken, and that the plea of acquiescence and waiver, as to the matters there alleged be sustained (R. 299–314).

With reference to the 1896 foreclosure, the master ruled that the matters alleged did not constitute a breach of the company's contract, and hence not a defense to the company's claim for compensation; that, while the plea of *res judicata* was evidentiary and hence not available on motion to strike, the plea was a good one if then available; and finally, that the United States was estopped to deny that, as a result of the 1896 reorganization, the rights of the Northern Pacific Rail*road* Company, a federal corporation, had passed to the Northern Pacific Rail*way* Company, a Wisconsin corporation (R. 378–83).

We may concede for purposes of the present argument that whatever rights were given by the granting act and resolution are now vested in the

appellee Northern Pacific Railway Company. The question for determination here is the present extent of those rights. Specifically, the inquiry at this juncture narrows itself to the single point whether the alleged violations of the above-quoted provisions of the Resolution amount to a substantial breach of the company's contract. We contend that they do, and that therefore the court below erred in dismissing subdivisions IX and XVIII from the bill.

1. The foreclosure provisions of the Joint Resolution expressed a dominant public policy.

The language of the proviso is mandatory. Its requirements are specific. They are expressive of a dominant public policy against monopoly and mortmain. That policy was defeated, and those requirements were violated, by consent decrees obtained by the officers and agents of the company in foreclosure proceedings in which it occupied the masterful position of being both buyer and seller.[65]

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[65] See *Investment Registry Co.* v. *Chicago & M. E. R. R. Co.*, 212 Fed. 594, 610 (C. C. A. 7th):

"If, in Northern Pacific Ry. Co. v. Boyd, 228 U. S. 482, 33 Sup. Ct. 554, 57 L. Ed. 931, an outside combination in competition with the reorganization committee, had been confirmed as the purchaser at $61,500,000, we can hardly conceive that Boyd would have been permitted to go behind the sale. *But, because the purchaser had created the masterful situation of controlling the sale, because the purchaser was not a stranger but the virtual owner of the property exposed for sale, neither the principle of the 'stability of judicial sales' nor 'compliance with the forms of law' nor the intent to commit 'no fraudulent act' was sufficient to stop a*

The sales there made, "in violation of and in evasion of the provisions of the resolution of May 31, 1870," were one of the grounds strongly relied on by Congress in declaring the forfeiture in 1929 (70 Cong. Rec. 5121, Item [e]).

In both the 1875 and 1896 foreclosures, there was a failure to sell to third parties. The obligation to do so is implicit in the Joint Resolution. Its provisions that the sale upon foreclosure be public, in single sections or subdivisions, in places in the States or Territories where the land is situated, show on their face that purchase by the public was contemplated. Congress must be deemed to have been aware of the practice of purchasing the properties of an insolvent company with bonds upon a reorganization incident to foreclosure, and, by its insistence upon a sale in single sections, etc., to have expressed a purpose to forbid that practice here. This sale differed from the usual foreclosure sale. Here Congress had given the company, for specific purposes, the lands which were being sold. In giving them, Congress could specify how they should be sold in order that the desired purposes might be accomplished.

That Congress intended sales to be made to third persons is further shown by the legislative history

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court of equity from inquiring whether an 'undue or unfair advantage' had been taken. Courts of equity should be deemed no less powerful today than when the first chancellor looked to his conscience for guidance, to make fair dealing between man and man the test." [Italics added.]

of the Resolution. As has been pointed out above, pp. 147–49, the opponents of the Resolution as introduced feared that the company would maintain a monopoly of its land grant, especially if it were able to mortgage it.[86] For this reason, as well as to put the lands in the hands of actual settlers, they procured inclusion, not only of the provision for settlement and preemption, but also of the provision for public sale of the mortgaged lands, upon foreclosure or sale by the trustee, in single sections in the States or Territories where situated. Both provisions were intended to implement the same public policy, and both, if complied with, would have been effectual to that end. Instead, the allegations of the bill (R. 35, 36), that no bona fide sales were made to third persons, as contemplated by the Joint Resolution, were stricken by the court below.

2. The company has not excused its violation of those provisions

The company urged below that, with respect to the sales of surveyed lands in 1896 complained of in Subdivision XVIII, and the sales of both surveyed and unsurveyed lands in 1875 alleged in Subdivision IX, it was impossible to sell the rest of the

[86] See also Cong. Globe, 41st Cong., 2d Sess., pp. 2480, 2481 (Senator Howell); pp. 2570, 2571 (Senator Thurman); p. 2578 (Senator Howell); pp. 2583, 2835 (Senator Wilson); p. 2845 (Senator Howell); p. 2846 (Senator Thurman).

lands according to the requirements of the Resolution because no patents or certificates had been issued therefor. But the Resolution nowhere makes any distinction between lands patented and other lands. It is established that as to the place lands the Northern Pacific grant was a grant *in praesenti*, effective even though patents had not been issued. *St. Paul & Pacific R. R. Co.* v. *Northern Pac. Ry. Co.*, 139 U. S. 1, 5–6. Further, it was the company's own fault that it did not secure patents. The records indicate that the company refused to pay the survey fees which the Act of July 15, 1870, c. CCXCII, 16 Stat. 305 (App. 60), required to be paid before patents might be issued. It paid only $65.00 in survey fees in 1872, and nothing in 1873, 1874, and 1875. Sen. Exec. Doc. No. 126, 49th Cong., 1st Sess., pp. 4, 11; J. C. R. 3693.[87] In these circumstances, the company cannot rely on the nonissuance of patents as an excuse for violating the provisos of the Joint Resolution; self-created impossibility, under familiar and long-settled principles of contract, is not justification for nonperformance. *Roehm* v. *Horst*, 178 U. S. 1, 18, 19; *Central Trust Co.* v. *Chicago Auditorium Co.*, 240 U. S. 581, 589; *Chicago & E. I. R. R. Co.* v. *Collins Co.*, 249 U. S. 186; 6 Williston, *Contracts* (Rev. Ed.), sec. 1959.

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[87] Apparently the real reason for refusal to pay survey fees was the desire to avoid local taxation of the land. See *Northern Pac. R. R. Co.* v. *Traill County*, 115 U. S. 600, 610.

The company urged the further objection, with reference to the sale of unsurveyed lands in 1875, that these could not have been sold in single sections because they were not so marked out. But the company did contract to sell single sections of unsurveyed land before 1875 (J. C. R. 3267), and it had power to do so, as the Department of the Interior has held. 36 L. D. 527. Moreover, even if it had been impossible to sell the unsurveyed lands in single sections, the mandate of the statute should have been obeyed insofar as it directed the sale of these lands in the States or Territories where situated.[68] At most there was a partial impossibility, which would not excuse complete noncompliance. 6 Williston, *Contracts* (Rev. Ed.), sec. 1956; *Restatement of Contracts*, sec. 463.

Nor is there more substance to the argument of the company that the sale in 1875 of the 838,852 acres was valid because it was made under the provision in the mortgage of 1870 which allowed the company to sell lands, at prices approved by the trustees, but at not less than $2.50 per acre.[69] These

[68] This was done in the 1896 proceedings. See J. C. R. 1411.

[69] The court at first ordered all the lands sold at public sale in single sections, etc. (J. C. R. 694, 698); then restricted the order to the earned lands along the completed portion of the road (J. C. R. 701); and then upon being informed that only earned patented and certified lands could so be sold (J. C. R. 702–703), amended the order accordingly, and suspended its operation pending the filing of lists of such lands (J. C. R. 705). The railroad from the beginning was allowed to sell lands according to the mortgage

838,852 acres had been patented or certified to the company. The receiver and trustees sold those to the bondholders' committee at $2.50 per acre, no money actually passing, the bonds being used for payment. This constituted an attempt to evade the letter and spirit of the Resolution. The mortgage was being enforced by foreclosure and the mortgaged lands were being sold by the trustees because of a default; consequently, the lands should have been sold at public sale in single sections, in the States and Territories where situated. No different method of disposal was authorized once these conditions occurred. Exhibit E, Mortgage of July 1, 1870 (attached to the bill, but not printed) at p. 6; J. C. R. 735.

Finally, "granting the obstacles and infirmities, they were but promptings and reasons for an appeal to Congress to relax the law; they were neither cause nor justification for violating it." *Oregon & California R. R. Co.* v. *United States*, 238 U. S. 393, 423.

3. The circumstance that the sales were made pursuant to a court decree is no excuse here

The company argued below that, if the requirements of the proviso imposed any duty at all in the circumstances of the foreclosures, that duty was placed, not on the company, but on the court. But

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provision (J. C. R. 696), and the receiver succeeded to this power. It was under this power that the sale of the 838,852 acres was made.

this overlooks that the granting Act and Resolution made a grant upon condition, and thus imposed a duty on the company to insure that the provisions were complied with.

If there was no affirmative duty, there was at least the negative duty not to influence the court to order sales contrary to the Resolution. See *Oregon & California R. R. Co.* v. *United States,* 238 U. S. 393, 421. This is the duty of nonprevention. Cf. *Patterson* v. *Meyerhofer,* 204 N. Y. 96, 97 N. E. 472; *United States* v. *Behan,* 110 U. S. 338, 346; 5 Williston, *supra,* sec. 1293 A. The company violated this duty by consenting to the manner of sale proposed by the trustees and bondholders. J. C. R. 704. Moreover, as a participant in the collusive reorganization, it must, for purposes of testing the sufficiency of the challenged subdivisions, be considered as one of the proposers and instigators of the manner of sale adopted.

If it be argued that the duty of having the lands sold in one way was excused by a decree ordering them sold in some other way—in other words, that this was an impossibility of law caused by a supervening judicial order, *Restatement of Contracts,* sec. 458 (b)—the short answer is that this excuse is not available to one who secured the order himself or was in any way guilty of neglect. *Operators' Oil Co.* v. *Barbre,* 65 F. (2d) 857, 861–62; *Washington Mfg. Co.* v. *Midland Lumber Co.,* 113 Wash. 592, 194 Pac. 777; *Restatement of Contracts;*

sec. 458. Or, as this Court pointed out in *Northern Pac. Ry. Co.* v. *Boyd*, 228 U. S. 482, 502, involving one of the very reorganizations now under consideration:

> There is no difference in principle if the contract of reorganization, instead of being effectuated by private sale, is consummated by a master's deed under a consent decree.

4. The matters here complained of are not res judicata

Inasmuch as the United States was not a party to any of the foreclosure suits, the decrees entered therein would not bind it. Freeman, *Judgments* (5th Ed.) §§ 627, 773.—The circumstance that the Government was not a party in those proceedings was specifically called to the attention of Congress in 1929 (70 Cong. Rec. 5121, item [c]).

But it was argued that the validity of the foreclosure proceedings, particularly of the one in 1896, was *res judicata* between the parties hereto, and that the United States could not now avail itself of any irregularities in those proceedings, citing *United States* v. *Northern Pac. Ry. Co.*, 193 U. S. 1 (the *Portland Overlap* case), *Northern Pac. Ry. Co.* v. *United States*, 227 U. S. 355 (the *Yakima Indian Reservation* case), and *United States* v. *Northern Pac. Ry. Co.*, 256 U. S. 51 (the *Forest Reserve* case).

We do not press the technical point that these cases are evidence to be adduced at the trial, and

cannot be pleaded in bar, Freeman, *supra*, sec. 798; see R. 285. The substantial reason why they cannot be *res judicata* here is that they involved different causes of action and hence can be conclusive only as to the issues actually and properly determined therein. *Cromwell* v. *County of Sac*, 94 U. S. 351, 353; *Oklahoma* v. *Texas*, 256 U. S. 70, 88. None of those cases involved the issue whether there had been a breach of duty in selling the lands in the manner in which they were sold. None of those cases involved any question of violation of the terms of the 1870 proviso. They establish at most that the United States is now bound to recognize that in the 1896 reorganization the Northern Pacific Railway Company, a Wisconsin corporation, succeeded to the interest of the Northern Pacific Railroad Company, a federal corporation. The United States is not seeking to deprive the company of land or money as a result of anything connected with the reorganization. All the United States seeks to do is to assign the violations of law involved therein as a reason why the company should be denied further performance under the contract. That issue was in no way involved in the three cases heretofore litigated between the United States and the company.

5. There was no acquiescence in or waiver of these breaches

The master sustained pleas of acquiescence and waiver as to Subdivision IX and of estoppel as to

Subdivision XVIII (R. 314, 383). We shall not repeat what has already been said, see Point II, *supra*, pp. 79–111, as to the unavailability of those defenses. It may, however, be significant that none of the reports, departmental decisions, or congressional bills and debates referred to by the master evidence any knowledge of a violation of the Resolution with reference to the method of sale. And it cannot be urged that prior nonaction now binds the United States because the company thereafter placed mortgages on the property. Mortgages were placed on the property contemporaneously with the reorganization, and obviously without reliance on the stand of the United States. Congress in 1929 could properly require that those violations be made a subject of judicial inquiry.[70]

6. The absence of pecuniary damage is immaterial

The damages flowing from the breach are these: First, the company was enabled to keep the land and sell it later at a higher price than it would have secured at a bona fide foreclosure sale (R. 18).

[70] On motion of defendants Bankers Trust Company and City Bank Farmers Trust Company, all of the defenses of innocent purchaser for value interposed by said defendants were by order of January 29, 1936 (R. 418), reserved until final hearing. The United States expects, at the proper time, to contend among other things that, under the principle that one cannot be an innocent purchaser of after-acquired property, the trust companies cannot under any circumstances be innocent purchasers for value of the withdrawn indemnity lands involved in this suit.

This is an "illegal emolument" which does not belong to the Company. *Oregon & California R. R. Co.* v. *United States,* 238 U. S. 393, 436; *Arkadelphia Co.* v. *St. Louis S. W. Ry. Co.,* 249 U. S. 134, 145–146. Congress could reasonably have declared this undue enrichment due to the United States. *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337; *United States* v. *Jefferson Electric Co.,* 291 U. S. 387. The fact that the amount of this illegal emolument cannot be estimated quite obviously is not a condonation of the breach.

But, further and more important, there is the damage inflicted by the frustration of the public policy of the United States. Admittedly, that damage cannot be reduced to dollars and cents. But it by no means follows that the United States is left without a remedy. This breach is set up, not as a basis for an accounting by the company, but as a reason why the company is not entitled to any further performance from the United States. Even if the breach does not warrant damages, it certainly justifies a cessation of counter-performance. *Cf. Causey* v. *United States,* 240 U. S. 399, 402; *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 409. That is the effect which we urge for it here.

It can not be argued that the dominant purpose of the grants was to build the railroad, much less to facilitate the financial maneuvers of its incorporators, and that the purpose of settling the Northwest was subordinate thereto. The terms of the

Resolution are explicit; Congress must be deemed to have desired the paramount object that, in the event of foreclosure, there should be an open and unhindered sale. In any event, as this Court has pointed out, "both purposes * * * were to be subserved." *Oregon & California R. R. Co.* v. *United States*, 238 U. S. 393, 417. In the reorganizations, the company gave no consideration to the purpose of settlement.

The company violated the provisions of the Joint Resolution in both reorganizations. That breach is, like the others, a reason justifying the United States in withholding further performance. It was error to eliminate that breach from consideration.

E. THE COMPANY'S ILLEGAL DISPOSITION OF ITS ASSETS AMOUNTED TO A SUBSTANTIAL BREACH OF ITS CONTRACT[11]

These illegal dispositions of the company's assets, alleged in four separate subdivisions of the bill, were of three kinds: Illegal dispositions of its capital stock without consideration, illegal retirement of outstanding capital stock by conveyance of granted lands, and illegal use of the proceeds of the granted lands for the construction of numerous branch or "feeder" lines without first having completed the line contemplated by the Act and Resolution.

The bill alleges (Subd. VII, R. 8) that the company issued as fully paid 6,000 shares of its capital

[11] Assignments 1, 2, 5, 6, and 9 (R. 651, 652) *supra*, pp. 39–42.

stock, having a par value of $100 per share, without such sum being paid therefor, and later reacquired the stock through purchase, or otherwise.

The bill further alleges as follows (Subd. VIII, R. 9): Certain officers of the company entered into a contract with Jay Cooke & Company, by which the entire railroad enterprise was divided into 24 equal parts, 12 of which were to be owned by the President of the company and his associates and 12 by Jay Cooke & Company. It was further agreed that $80,001,000 of the capital stock should be subscribed for by the holders of the 24 parts and should be issued in fully paid up stock as follows: $93,400 par value to be issued to the holders immediately, and $40,500 par value to be issued to the holders of each of the 24 parts as each 25 miles of the road were completed. The remaining $19,999,000 par value was to be delivered to Jay Cooke & Company as fully paid capital stock; as the proceeds of the sale by Jay Cooke & Company of each $1,000 bond of the company was placed to the credit of the company, $200 par value of this stock was to be placed to the credit of Jay Cooke & Company. Under and by virtue of such agreement, a total of 299,526 shares of the capital stock having a par value of $29,952,600 were issued as fully paid stock without any consideration having been received therefor by the company. The entire capital stock of the company was withdrawn from public subscription and pledged for distribution

according to the terms of such agreement. In consequence of such dissipation of the capital stock, the company deprived itself of the money it should have received, had the stock been sold in the manner required by the Act. Thus the company breached its contract and incapacitated itself for constructing the railroad and telegraph line contemplated by the granting Act and Resolution.

The bill likewise alleges (Subd. XII, R. 21): The company conveyed 3,500,000 acres of its granted lands to the holders of $15,000,000 par value of its preferred stock and thereby retired and cancelled such stock. The $15,000,000 par value of stock thus retired had been issued under the reorganization agreement of June 30, 1875, made in connection with the 1875 foreclosure proceedings. Large acreages of the lands so exchanged were lands which should have been disposed of in the 1875 foreclosure proceedings under the terms of the proviso in the Joint Resolution of 1870 (just discussed, *supra*, pp. 158–74).

The bill additionally alleges (Subd. XIV, R. 23) that the granting act contemplated that the properties, including capital stock, lands, credits, and other assets of the company should be used primarily to build the road contemplated by the granting acts; that a large part of said properties were not so used either within the time specified by Congress for the completion of the road or at all, but on the contrary, while the road remained uncompleted,

numerous branch lines were constructed under and by virtue of fraudulent and collusive contracts, thus using the assets of the company which should have been devoted to the construction of the road contemplated by the Act and Resolution. It is alleged that the illegal contracts were made in this manner:

In 1881 the Oregon & Trans-Continental Company was incorporated by officers of the Northern Pacific Railroad Company to own a controlling interest in both the Northern Pacific Railroad Company and the Oregon Railway and Navigation Company (a company owning and operating a railroad through the valley of the Columbia River). At that time Henry Villard was president and held control of the stock of the Northern Pacific Railroad Company (R. 24, 191) and the Oregon Railway & Navigation Company (N. P. Ex. 71, unprinted) and was the organizer of the Oregon & Trans-Continental Company (R. 24). After acquiring this control, the Oregon & Trans-Continental caused the Northern Pacific to enter into certain tripartite contracts with it and with certain branch line railroad companies, the stock of which was owned by the Northern Pacific, under which the Northern Pacific undertook to and did construct certain branch line railroads for these branch line companies, with money furnished it by the Oregon & Trans-Continental; in return the Oregon & Trans-Continental received $20,000 in bonds

of the branch line companies for each mile of railroad constructed under the tripartite agreements. By such contracts the Northern Pacific was obligated to pay to the branch line companies a minimum net annual income of $1,400 per mile of operating road irrespective of the earnings of the branch line companies. Approximately $11,000,000 par value of such branch line bonds were issued to the Oregon & Trans-Continental. The cost to the Oregon & Trans-Continental of constructing the branch lines was far below the par value of the bonds received by it. The tripartite contracts were collusive and fraudulent devices whereby the Oregon & Trans-Continental controlling the Northern Pacific received unconscionable and illegal profits at the expense of the Northern Pacific at a time when the latter company had not completed its contract with the United States, particularly with reference to its obligation to build the road from Wallula to Portland via the valley of the Columbia River, and at a time when the assets of the Northern Pacific should have been applied to the completion of that contract.

All of the foregoing allegations were stricken from the bill (R. 411–12), following the master's recommendation. It was the master's view that Subdivisions VII and VIII, setting out the failure to make the required stock subscriptions, and the making of the so-called "Original Interests Agreement"—the agreements between Jay Cooke & Com-

pany and the promoters dividing the Northern Pacific Stock—had "no relevancy whatever to the land grant provisions of the Act" (R. 298). Subdivision XII, dealing with the disposition of granted lands in return for preferred stock, was recommended for dismissal along with the other allegations based on the 1875 reorganization, but without special mention (R. 299–314). Subdivision XIV, setting up the branch lines transaction with the Oregon & Trans-Continental Company, was ordered struck out because, in the master's view, "the facts alleged can have no bearing whatever in the adjustment of the land grant" (R. 386).

This rather cavalier attitude on the master's part overlooks two aspects of significance.

First, it ignores the fact that the very matters alleged in these four stricken subdivisions were expressly relied upon by Congress as a basis for its declaration that the company, by reason of its several breaches of contract, had forfeited its rights to recover further indemnity lands thereunder.[72] Second, the facts alleged indicated a sub-

[72] It may be convenient at this point to recall the remarks of Congressman Colton (70 Cong. Rec. 5121–22), which were incorporated by reference in the committee report on the bill that became the Act of June 25, 1929:

"In arriving at the conclusion that the forfeiture should be declared, your committee was influenced by, among other things: * * *

"(f) the disposition of the capital stock of the Northern Pacific Railroad Co. under the original interests agreements in violation of Section 10 of the Act of July 2, 1864;

stantial breach of the contract on the part of the company, sufficient to disentitle it to further performance from the United States. Absence of pecuniary damage is not material. In a suit such as the present one, the United States is not asserting simply the commercial interest of a vendor of real estate. While the United States is a proprietor, it is also a trustee for all the people, and when it sues, its "purpose is not merely to regain the title but also to enforce a public statute and maintain the policy underlying it." *Causey* v. *United States*, 240 U. S. 399, 402; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 409.

The facts arrayed in the stricken subdivisions present a wanton violation of the express requirements of Section 10 of the 1864 Act (App. 47),

> That all people of the United States shall have the right to subscribe to the stock of the Northern Pacific Railroad Company until the whole capital named in this act of incorporation is taken up, by complying with the terms of subscription * * *,

and of the implied obligation of the company to use the lands granted to it, and proceeds from those

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(g) the issuance of the capital stock before and after the 1875 reorganization, without compensation being made therefor; (h) the illegal disposition of granted lands for preferred stock and the illegal cancellation of the preferred stock; * * * (k) the affiliated land and construction companies * * *. These propositions were given weight, singly and collectively, by your committee in arriving at the conclusion that the forfeiture covered by Section 2 of H. R. 17212 be declared."

lands, to aid in the construction of a specified railroad. That the Northern Pacific road was a national enterprise, and that the quoted provision was intended to make it so, has, we submit, been recognized by this Court. See *Roberts* v. *Northern Pac. R. R. Co.*, 158 U. S. 1, 21.

The requirement of Section 10 just set out was expressive of a public policy. Prior to the chartering of the Northern Pacific Company the enterprise which culminated in the issuance of that charter had been known in Congress as "The People's Pacific Railroad Company" (Cong. Globe, 38th Cong., 1st Sess., p. 2291). Congress intended that the stock of the Company should be placed in the hands of "all the people of the United States" and that they should share in the benefits conferred by the huge grant of public lands. The capital stock of the company was to be open to subscription by "all the people * * * until the whole capital named in this act of incorporation is taken up, by complying with the terms of subscription," which contemplated payment of $100 for each share of such stock. The Original Interests Agreement which provided for a division and distribution of the stock among a few favored insiders, thwarted that public policy, and violated the terms of a statute, which, until and unless repealed, was binding upon all.

The exchange of granted lands in retirement of capital stock likewise helped to defeat the purpose

for which the grant was made, as did also the unwarranted waste of the company's assets in the construction of branch-line roads by dissipation of assets which should have been used in discharge of the trust imposed by Congress upon the company and for which the public aid was given. As this Court has pointed out in a case involving the Northern Pacific grant, "When the lands finally became the property of the company, they were impressed with a trust in favor of the government, as representing the public, that they should be used for the purpose for which they were granted * * *." *McHenry* v. *Alford*, 168 U. S. 651, 667. Even as to the Union Pacific grant, this Court has pointed out that the grant carried "the implied duty of devoting the proceeds of sales or dispositions strictly and faithfully to aid in the construction of the road." *Platt* v. *Union Pac. R. R. Co.*, 99 U. S. 48, 63. To do otherwise would be "a fraud upon the grantor of the franchise." *Burke v. Smith*, 16 Wall. 390, 397. To dissipate the company's capital stock or its assets was a fraud upon the United States.[73]

[73] "And it is clear that the directors of a company, organized under the law, have no power to destroy it, to give away its funds, or deprive it of any means which it possesses to accomplish the purposes for which it was incorporated. The stock subscribed is the capital of the company, its means for performing its duty to the commonwealth, and to those who deal with it. Accordingly, it has been settled by very numerous decisions that the directors of a company are incompetent to release an original subscriber to its

Having violated its contract in this respect, a breach that was substantial because it frustrated the express public policy of the United States, the company is not now entitled to additional indemnity land or to compensation on account of any additional indemnity lands.

F. THE COMPANY'S FAILURE TO OBTAIN BONA FIDE SUBSCRIPTIONS TO ITS STOCK NECESSARILY DEPRIVES IT OF ANY RIGHT TO FURTHER PERFORMANCE BY THE UNITED STATES

The bill alleges (Subd. VI, R. 8) and the motion to strike admits (R. 154) that the company failed to obtain the bona fide stock subscriptions required by Section 19 of the Act of 1864 (App. 51). Whether the result is that the Act thereby became null and void, as provided by its terms and argued as Point 2 at the prior hearing (U. S. Br. 59–66; N. P. Br. 16–23; U. S. Rep. Br. 12–18), or whether this was simply another breach of the contract between the United States and the company, as alleged in the bill (R. 8), is immaterial. In either event the result is to deprive the company of any right to further performance by the United States.

This point was not set down for reargument.

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capital stock, or to make any arrangement with him by which the company, its creditors, or the State shall lose any of the benefit of his subscription. Every such arrangement is regarded in equity, not merely as *ultra vires*, but as a fraud upon the other stockholders, upon the public, and upon the creditors of the company." *Burke* v. *Smith*, 16 Wall. 390, 395.

G. THE COMPANY'S FRAUD IN CONNECTION WITH THE MINERAL CLASSIFICATION UNDER THE ACT OF 1895 WAS A SUBSTANTIAL BREACH OF ITS CONTRACT[74]

Under this heading will be discussed the question whether the fraud alleged in subdivision XXVIII of the bill (R. 60–65) amounts, in and of itself, to breach of the company's contract so substantial as to disentitle it to any compensation here. The further question whether, in the event that compensation is found payable, the fraud alleged operates to diminish the area for which such compensation may be awarded, was not set down for reargument, and is not considered here.[75]

The substance of the fraud allegation is not difficult to state. The company was entitled to indemnity lands, within fifty miles of the road, in lieu of mineral lands within the place limits. The Act of February 26, 1895, c. 131, 28 Stat. 683 (App. 95) prescribed a machinery and procedure for the classification, as mineral or nonmineral, of the lands involved. The Act provided (Section 6; App. 100) that "the classification, when approved by the Secretary of the Interior, shall be considered final, *except in case of fraud.*"[76] The bill alleges

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[74] Assignments 24–27 (R. 654–55), *supra*, pp. 43–45.

[75] See Assignment 28 (R. 655), briefly noted as Point V (C) (1), pp. 238–39 below, and discussed as Point 1 at the first argument. U. S. Br. 46–58; N. P. Br. 59–86; U. S. Rep. Br. 4–12.

[76] The italicized phrase was really nothing more than a codification of existing law. Findings of fact by the Secretary of the Interior are never conclusive upon proof of fraud. See *West* v. *Standard Oil Co.*, 278 U. S. 200, 219;

that the company fraudulently procured worthless nonmineral lands in the primary limits to be classified as mineral, thus obtaining, by its own fraud, an opportunity which it would not otherwise have had to select indemnity lands of greater value. The question here is whether, in view of that fraud, which stands admitted by the motion to strike (R. 154), the company can now maintain a claim for compensation based on a contention that the United States has wrongfully deprived it of withdrawn lands within the indemnity limits.

The master (R. 349) and the court below (R. 409–410, 411–412) struck out the subdivision and sustained the company's claim to compensation. It is our contention that this was serious and fundamental error. We submit that the fraud alleged, standing admitted on the present record, bars any further claim the company might have, for land or money, whether asserted at law or in equity.

1. The fraud alleged bars any further claim at law.

The effect of the ruling below is that fraud can be disregarded. The substance of the decision is that, notwithstanding the railroad's admitted fraud on the United States, which resulted in the company's obtaining indemnity lands to which it would

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Cameron v. *United States*, 252 U. S. 450, 464; *Johnson* v. *Drew*, 171 U. S. 93, 100; *Burfenning* v. *Chicago &c. R. R.*, 163 U. S. 321, 323; *United States* v. *California &c. Co.*, 148 U. S. 31, 43; *Heath* v. *Wallace*, 138 U. S. 573, 585; *United States* v. *Minor*, 114 U. S. 233, 243–244.

not have been entitled, and on which it now relies for compensation for withdrawn lands in the indemnity limits, a court of equity will disregard the fraud, and adjudge the United States to be obligated to pay compensation for withholding those withdrawn lands.

It seems too clear for argument that the company's fraud in these circumstances was not only a breach of its contract with the United States, but a breach so substantial in nature as to release the United States from any further obligation with respect to indemnity lands. This was the view taken by the Congress. See 70 Cong. Rec. 5121, item (b). Purely as a matter of contract law, the company's fraud in connection with the mineral classification, a classification on which its right to indemnity was based, so taints the entire performance of its contract that it cannot now be heard to claim any further rights thereunder. This is a proposition of common law, and indeed of even the most rudimentary justice, which seems entirely self-evident.

2. The fraud alleged bars any further claim in equity

The bill expressly alleged that, by reason of the matters set out in subdivision XXVIII, the company was not entitled to further lands or moneys based on the mineral classification (R. 65). At the hearings before the master, it was urged on behalf of the government that the allegations in question

gave rise to the application of the doctrine that one who seeks the aid of a court of equity in enforcing a contract must do so with clean hands,[11] and thus barred the company from any decree against the United States growing out of the land grant. But the master held that the clean hands doctrine could not bar the company because here it was a defendant, not a complainant. "The doctrine * * * has no application whatever to the defendant who is brought into court *in invitum*, and whose position in the litigation is purely defensive" (R. 281). And, on that reasoning, he consistently refused to consider any breach or iniquitous conduct on the part of the company. The court agreed, specifically in the application of this ruling to the fraudulent mineral classification (R. 409–410), and thus condoned the company's fraud and defaults.

We submit that this holding completely misapprehends the company's position in the present litigation, and that it cannot be sustained on any principle of equity jurisprudence.

The company's lack of clean hands bars its claim here because it is seeking affirmative relief in a court of equity.

(a) The present suit, so far as the company is concerned, is a suit to acquire title. This is

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[11] *Cathcart et al.* v. *Robinson*, 5 Pet. 264; *Elkhorn-Hazard Coal Co.* v. *Kentucky River Coal Corporation*, 20 F. (2d) 67, 71 (C. C. A. 6th); cf. *Kitchen* v. *Rayburn*, 19 Wall. 254; *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218; see 1 Pomeroy, *Equity Jurisprudence* (4th ed.), pp. 737–761.

certainly so as to the patents for 45,178.60 acres of indemnity lands, awarded the company by the decree below (R. 634). And the case is in no different posture with respect to so much of the decree as awards merely compensation. The gravamen of the company's claim is that the forest reserve withdrawals of indemnity lands were unlawful because its own right thereto was better than that of the United States. That, at any rate, is the rule of the *Forest Reserve* case, 256 U. S. 51. In other words, the company is asserting a title superior to that of the United States, and is asking affirmative relief with respect to that title. It seeks a money judgment in its favor (R. 248) based on the alleged wrong suffered by reason of having been deprived of indemnity lands through the forest withdrawals. In these circumstances, the company is subject to the requirement that it come into court with clean hands. *Twist* v. *Prairie Oil Company,* 274 U. S. 684; *Green* v. *Halsted,* 77 Colo. 578, 238 Pac. 40; *Scott* v. *Sullivan,* 79 Colo. 173, 244 Pac. 466; *Drummond* v. *Christensen,* 85 Colo. 284, 275 Pac. 906; *Tampa and J. Ry. Co.* v. *Catts,* 79 Fla. 235, 85 So. 364; *Shelt* v. *Baker,* 79 Ind. App. 606, 137 N. E. 74; *Steinwand* v. *Brown et al.,* 38 N. D. 602, 166 N. W. 129; *Bernauer* v. *McCaull-Webster Elevator Company,* 41 N. D. 561, 171 N. W. 282, 283; *Spradling* v. *Glenn,* 95 Okla. 75, 218 Pac. 824; cf. *Commonwealth Finance Corp.* v. *McHarg,* 282 Fed. 560, 569 (C. C. A. 2d); *Sauter* v. *First Na-*

tional Bank of Philadelphia, 8 F. (2d) 121 (C. C. A. 7th).

A prayer that one's title be established and for general equitable relief has always been considered as a prayer for affirmative relief. *Roberts* v. *Northern Pac. R. R. Co.* 158 U. S. 1. The position of the defendants here is not unlike that of the defendants in the *Roberts* case. There the railroad sought to acquire title to certain lands and the defendants prayed both that the title be established in them and for equitable relief. After pointing out that the defendants' claim was inequitable, this Court said (pp. 13–14):

> Nor can it be said that these observations do not apply to Roberts and Ellis, who, as defendants in the equity proceedings, may claim to be regarded as involuntary parties, for, in their answer, they do not content themselves with denying the complainants' title, but offer to do equity, to an insignificant extent, by offering to return the amount of the taxes paid, and themselves pray for the decree that their title may be established, and for such other and further relief as may be proper and agreeable to equity.
>
> So far, at least, as the claim of Roberts and Ellis to affirmative equitable relief is concerned, we think that they cannot, in the circumstances disclosed, be permitted to assert the supposed invalidity of the county's grant to the railroad company.

The United States alleges that it has legal title to and possession of the withdrawn lands to which

it seeks to have its title quieted. The company's claim of right is through a contract with the United States, not through some other source. Under these circumstances the United States is not obliged to prove the invalidity of the company's claim. The company has the duty of establishing and maintaining its claim against the United States. If it fails to do so the United States should prevail. *Maury* v. *Jones,* 25 F. (2d) 412 (C. C. A. 9th); *Sears* v. *Murdock,* 59 Ore. 211, 117 Pac. 305; *Spradling* v. *Glenn,* 95 Okla. 75, 218 Pac. 824. Without clean hands with respect to its performance of the contract, the company does not have any standing in a court of equity to show a superior title.

(b) But, apart from the question of title, the company is asking affirmative relief because the present case is an accounting, required by the 1929 Act. See pp. 73–76, *supra.* Therefore, the company is an actor, since "an accounting involves the possibility of affirmative relief to either party." *Nelson* v. *Bailey,* 22 N. E. (2d) 116, 120 (Mass.).

As stated in *Downes* v. *Worch,* 28 R. I. 99, 100, 65 Atl. 603:

> It is certainly the general rule in equity that affirmative relief will not be granted to a defendant unless he makes claim to it by a cross bill * * * by setting up in the answer any matter that would be available on cross bill.

> But it is equally well settled that a suit in equity for an account between the parties is an exception to this general rule; that a bill, in such a suit, imports an offer on the part of the complainant to pay any balance that may be found against him; that upon such an accounting both parties are actors, and that either is entitled, according to the result, to the aid of the court to recover the balance that may be found in his favor; and that it is not necessary for the respondent to file any cross bill, or to set up matter in his answer in lieu of such cross bill.[78]

Curiously enough, the master in his second report (R. 434–438) recognized that the present suit was one for a general accounting, in which all concerned were actors seeking affirmative relief.[79] He stated (R. 435):

> In *McManus* v. *Sawyer* (D. C. S. D. N. Y., 1915), 231 Fed. 231, 238, Judge Learned

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[78] *Accord: Grand Bay Land Co.* v. *Simpson*, 205 Ala. 347, 87 So. 186; *Wilde* v. *Sawtelle*, 232 Mass. 117, 122 N. E. 167; *Zuckernik* v. *Jordan Marsh Co.*, 290 Mass. 151, 194 N. E. 892; cf. *Wootton Land & Fuel Co.* v. *Ownbey*, 265 Fed. 91 (C. C. A., 8th); see 2 Story, Equity Jurisprudence (14th ed.) § 698.

[79] He cited, in support of the rule just stated, the following authorities: *Luckenbach S. S. Co.* v. *The Thekla*, 266 U. S. 328, 340; *Farmers' Loan and Trust Company* v. *Denver L. & G. R. Co.*, 126 Fed. 46 (C. C. A. 8th); *McManus* v. *Sawyer*, 231 Fed. 231 (S. D. N. Y.); *DeWalsh* v. *Braman*, 160 Ill. 415, 43 N. E. 597; *Wilcoxon* v. *Wilcoxon*, 199 Ill. 244, 65 N. E. 229; *Goldthwaite* v. *Day*, 149 Mass. 185, 21 N. E. 359; *Downes* v. *Worth*, supra.

> Hand said: "Moreover, it is a well-established rule that a party who demands an accounting submits himself to the result of the account if it goes against him. No cross-bill is necessary, and a decree may go for the balance either way." The rule that in an accounting no cross-bill is necessary is doubtless an application of the general principle that he who seeks equity must do equity.

How the master could reconcile the holding in his second report, to the effect that all concerned in the present accounting were to be regarded as seeking affirmative relief, with the holding in his first report that the company was not barred by the clean hands doctrine because its position was purely defensive, must remain an insoluble mystery of the present litigation. Certainly the irreconcilable contradiction between the two positions illustrates in sharp relief the master's determined disregard of every subdivision of the bill which alleged a default by the company. He has consistently pushed into view the rights conferred by the granting acts, and put out of view the wrongs committed by the company. *Cf. Oregon & California R. R. Co.* v. *United States*, 243 U. S. 549, 559.

The court below specifically mentioned the clean hands issue in its brief memorandum affirming the master's first report, and cited, as supporting its ruling (R. 409), the case of *Manufacturers' Fi-*

nance Co. v. *McKey,* 294 U. S. 442. The significance of that decision in the present connection is not perceived; it merely repeats the settled rule that equity will enforce a legal right, no matter how harsh or oppressive enforcement may be as against the other party. The question here is wholly different. The contention of the United States is not that enforcement of the company's legal right would be oppressive, it is that the company does not possess a legal right because of its fraud. This argument is supported, not contradicted, by the *McKey* case. There it was said (p. 449):

> But it is well settled, this court said in *Hedges* v. *Dixon County,* 150 U. S. 182, 189, "that a court of equity, *in the absence of fraud, accident or mistake,* cannot change the terms of a contract." [Italics added.]

The rule applicable here is elementary and, we should have thought, incontestable. It is, as stated in 1 Pomeroy, *Equity Jurisprudence* (4th ed.) § 401, p. 745:

> Whatever be the nature of the plaintiff's claim and of the relief which he seeks, if his claim grows out of or depends upon, or is inseparably connected with, his own prior fraud, a court of equity will, in general, deny him any relief, and will leave him to whatever remedies and defenses at law he may have.

Therefore, viewed as a matter purely of equit
the company's claim against the United Stat
must rest on its own merits, and on the company
standing in court to present it. Whether the in
stant suit be viewed as a controversy involvin
title, to determine whether the company's right t
the indemnity lands is superior to that of th
United States or otherwise, or whether it be re
garded as a suit for an accounting—and it i
actually both—the rule is the same. The com
pany's fraud, admitted on the present record, call
into play the operation of the clean hands maxim
The company's fraud prevents the company from
advancing in this proceeding its claim for compen
sation. The company's fraud relieves the United
States from any further claim in respect of
indemnity lands.

3. No Government official ever waived or acquiesced in the company's fraud in this respect

Nor can it be argued that the fraud was ever
waived or acquiesced in.

Prior to the inquiries before the Joint Committee
pursuant to the Resolution of 1924, there had been
nothing to bring to the Secretary of the Interior a
conviction that the company had been guilty of
fraud and corruption.

The master (R. 335–344) in stating his reasons
for concluding that subdivision XXVIII of the
bill should be stricken because of estoppel (R. 349),

describes the disclosures made to the Secretary of the Interior.

He indicates that at some time after March 11, 1908, a committee of the Montana Mining Association filed with the Secretary of the Interior a report complaining of the manner in which the work of classification had been done and that on March 4, 1909, the legislature of Montana sent a memorial to Congress seeking reclassification (R. 343). These complaints had no bearing on the company's fraud alleged as a defense to the company's claim in this suit. The Montana miners were not concerned about the company's fraud in getting lands classified as mineral. On the contrary they wanted to make mining locations in the place limits on lands which they claimed to be mineral but which had been classified as nonmineral. The memorial of the Montana legislature asserted merely that the commissioners were incompetent, that they had not examined the properties which they had certified that they had examined, and that the classifications were unscientific and erroneous. It was not suggested that the company was responsible for these errors or omissions (N. P. Ex. 57, R. 695, 697; N. P. Ex. 59, R. 705; N. P. Ex. Ex. 60, R. 713; N. P. Ex. 80, R. 725–31).

The only reliable information before the Secretary on which properly he might have acted was contained in the reports of a special agent sent out by the Interior Department to investigate.

This agent made two reports (N. P. Ex. 57, R. 695; N. P. Ex. 58, R. 699). One of these, dated February 1, 1908, details many of the charges of fraud which had been made, some of which the agent says were probably true (R. 343). It does not appear, however, that the agent's reports implicated the company in the fraud (N. P. Ex. 58, R. 699–705). He criticized mainly the commissioners' lack of practical knowledge and the impossibility of arriving at a correct classification (R. 697, 699, 702). Promptly, upon receiving these reports, the Secretary made an order against further issuance of patents (R. 727).

Conferences followed between the Secretary and the company's land commissioner (R. 732, 737). There is no suggestion that at any of these conferences, the Secretary of the Interior or any other officer of the Government had any knowledge or conviction that the company had been guilty of fraud or corruption in obtaining the classification. No facts were laid before Congress or before the Secretary which would make it seem probable that the company had participated in any fraud and, as far as appears, the Secretary had no information that the company had induced the commissioners to classify poor lands as mineral and good lands as nonmineral, irrespective of their mineral character, or that the commissioners had received passes or any other type of bribes from the company, or had any relations with the company which impaired

their disinterested exercise of judgment (R. 741–743). Nor is there anything in the records of suits in which the commissioners were parties, which the company has put in evidence (R. 689–693, N. P. Exs. 50–54), to bring to the attention of the Secretary any contracts between the commissioners and the company at the time the classifications were made. The commissioners involved in those suits had already left the commission.

The Secretary and the company's land commissioner arranged for a reclassification of a relatively small acreage but that arrangement was not based on any fraud on the part of the company. Nor was there any suggestion of any fraud practiced by the company. Although the commissioners' assertion that they had made a personal examination when they had not, is in itself a fraud, *Lamb* v. *Northern Pacific R. R. Co.*, 29 L. D. 102, that kind of fraud differs widely from the fraud relied upon as a defense here, which involved the company's active procurement of a classification made without regard to the mineral character of the land.

The Secretary has never in law or in fact waived any fraud or corruption on the part of the company or acquiesced in any of the company's fraud or corruption.

And, moreover, he would have had no power to do so. Congress never empowered any executive official to acquiesce in the company's fraud, or to

waive its derelictions in that regard. *United States* v. *San Francisco,* 310 U. S. 16, 31–32; *Wilber Nat. Bank* v. *United States,* 294 U. S. 120, 123; *Utah* v. *United States,* 284 U. S. 534, 545–46; *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 408–09.

We have outlined above the nature and extent of the company's breaches of contract relied upon here to defeat its claims for any further performance of that contract. These involve (a) its failure to complete the road; (b) its failure to sell the lands to settlers at $2.50 an acre; (c) its noncompliance with the provisions for foreclosure sales; (d) its disposition of its assets; and (e) the fraud it committed in connection with the mineral classification. Each one of these breaches, by itself, is substantial. Each one of these breaches, by itself, fully justifies the United States' refusal of counter-performance. But combined together, the sum-total of all the breaches is truly portentous, and utterly defeats any claim to counter-performance which the company might now put forward. It is significant in this connection that when Congress in 1929 declared the company's indemnity claims forfeited, it relied on the company's defaults "singly and collectively" (70 Cong. Rec. 5122).

IV. THE COMPANY MUST ACCOUNT TO THE UNITED STATES FOR THE LANDS AND VALUES IT HAS RECEIVED WITHOUT AUTHORITY OF LAW

Whether or not the company is entitled to any further performance on the part of the United States, and whether or not it is entitled to compensation in lieu thereof, it must in any event account to the United States for the lands and values which it has received without authority of law. This is expressly required by the Act of June 25, 1929:

> In the judicial proceedings contemplated by this Act * * * the court * * * shall consider, make findings relating to, and determine to what extent * * * lands, if any, have been wrongfully or erroneously patented or certified to said companies, or either of them, as the result of fraud, mistake of law or fact, or through legislative or administrative misapprehension as to the proper construction of said grants or Acts supplemental or relating thereto * * * (Section 5, App. 151).
>
> All lands received by the Northern Pacific Railroad Company or its successors, the Northern Pacific Railway Company, under said grants or Acts of Congress supplemental or relating thereto which have not been earned, but which have been, for any reason, erroneously credited or patented to either of said companies, or its, or their, successors, shall be fully accounted for by said

> companies, either by restitution of the land itself, where the said lands have not passed into the hands of innocent purchasers for value, or otherwise, in accordance with the findings and decrees of the courts. * * * the court * * * shall determine what quantities in lands or values said companies have received in excess of the full amounts they were entitled to receive * * * through mistake of law or fact, or through misapprehension as to the proper construction of said grants, or as a result of fraud, or otherwise, and said excess lands and values, if any, shall be charged against said companies in the judgments and decrees of said court (Section 6, App. 152–53).

Even apart from the provisions of the 1929 Act, the company would still be required to account for any lands and values it has erroneously received from the United States. For no principle is better settled than the proposition that the government is not bound by the acts of its officers who make unauthorized payments or conveyances under misconstruction of the law. *Wisconsin Cent. R.R. Co.* v. *United States,* 164 U. S. 190; *Wilber Nat. Bank* v. *United States,* 294 U. S. 120; *United States* v. *Saunders,* 79 Fed. 407; *Heidt* v. *United States,* 56 F. (2d) 559. Government officials cannot alienate government property without authority. *Lear* v. *United States,* 50 Fed. 65; *Flores* v. *United States,* 18 Ct. Cls. 352. The same principle is applicable to land grants; no erroneous construction of the

statute by the officers of the Land Department can enlarge the grant and result in a valid conveyance of land not granted by the Congress. *Cramer* v. *United States,* 261 U. S. 219, 234; *United States* v. *Whited & Wheless,* 246 U. S. 552; *Southern Pacific R. R. Co.* v. *United States,* 200 U. S. 341; *Wisconsin Central R. R. Co.* v. *United States,* 164 U. S. 190; *Doolan* v. *Carr,* 125 U. S. 618, 625.

It follows, both from the Act of 1929 and from settled principles independently of statute, that unauthorized acts of officers or agents of the United States conferred no rights upon the company, and afford no justification for the retention by the company of any lands and values thereby received.

A. THE COMPANY SHOULD BE REQUIRED TO ACCOUNT FOR THE MONEY RECEIVED BY IT IN EXCESS OF $2.50 AN ACRE FOR LANDS SOLD IN VIOLATION OF THE PROVISO OF THE JOINT RESOLUTION OF 1870[80]

It was alleged in subdivision XIII (R. 22–23) that although on July 4, 1884, five years after the date set for completion of the road, there were many million acres of lands granted by the Act and Resolution still in the possession of the company and subject to the proviso of the Joint Resolution of 1870 requiring that they be subject to settlement and preemption at a price not exceeding $2.50 per acre, none of these lands were opened to settlement and preemption, but that instead they were subsequently sold by the company at its own prices.

[80] Assignment No. 7 (R. 652), *supra*, p. 41.

In its prayer for relief the United States asked that the company be declared to have received in trust the moneys it received in violation of the settlement and preemption proviso (R. 81–82). The company asked that subdivision XIII be stricken (R. 154), but admitted in its answer (R. 190) that "subsequent to July 4, 1884, large acreages of land granted to" it were sold "at varying prices and were not opened to settlement and preemption."

The master recommended (R. 371–78) that the subdivision be stricken, and his recommendation was adopted by the court (R. 411–12). Amazingly enough, the master entirely overlooked the government's prayer for relief based on the stricken subdivision, saying (R. 372), "What injury was suffered by the government in consequence of this failure is not pointed out and no remedy that it may now have or ever did have in respect of this failure is suggested and no relief whatever based upon it is prayed for."

1. We have discussed above, pp. 133–58, the construction of the $2.50 proviso, and have shown that it was a breach of the company's covenants so substantial in character as to disentitle it to further performance by the United States. That discussion will not be repeated here. The point for present consideration is that the company must account to the United States for the money it received, in excess of $2.50 an acre, for lands sold in violation of the proviso.

2. The violation of the proviso in question was one of the matters relied upon by Congress in its declaration of limited forfeiture (70 Cong. Rec. 5121–22, item [d]), and the accounting by the company for the excess values received is specifically required by Section 6 of the 1929 Act:

> The court * * * shall determine what quantities in lands or values said companies have received in excess of the full amounts they were entitled to receive, * * * as a result of breaches of the terms, conditions, or covenants, either express or implied, of said granting Acts by said companies, or either of them * * * and said excess lands and values, if any, shall be charged against said companies in the judgments and decrees of said court.

3. Once it is established that the sales at more than $2.50 an acre violated the proviso, argument is not required to show that the company must account for the excess. It is sufficient to cite the Chamberlain-Ferris Act of June 9, 1916, c. 137, 39 Stat. 218, which ordered an accounting in respect of, *inter alia,* the violation of the $2.50 obligation of the Oregon and California Railroad Company. In that accounting, this Court held that the Oregon and California interest in the sold lands was no more than $2.50 an acre, that it must account to the United States for any excess received, and that the accounting requirements of the Chamberlain-Ferris Act were valid. *Oregon*

& Cal. R. R. Co. v. *United States,* 243 U. S. 549, 557–60. See also *United States* v. *Oregon & Cal. R. R. Co.,* 8 F. (2d) 645.

On the basis of these decisions, there exists no ground whatever for questioning the right of the United States to require the Northern Pacific companies to account for moneys received in excess of $2.50 an acre. Consequently the action of the court below, which dismissed Subdivision XIII, was obvious error.

B. THE COMPANY SHOULD BE REQUIRED TO ACCOUNT FOR THE VALUES IT DERIVED FROM LANDS WITHDRAWN FROM THE PUBLIC DOMAIN FOR ITS BENEFIT BETWEEN 1870 AND 1890 WITHOUT AUTHORITY OF LAW, AND WHICH, BUT FOR SUCH WITHDRAWALS, IT WOULD NOT HAVE RECEIVED[81]

It is alleged in subdivision XXXII of the bill (R. 72) that on the filing of maps of the general route of the road withdrawals of odd-numbered sections were made for the benefit of the company of lands within the primary limits of the grant as fixed by such maps; that such withdrawals operated to withhold the lands covered thereby from acquisition by settlers; that these withdrawals were held unauthorized and illegal in the case of *Nelson* v. *Northern Pacific,* 188 U. S. 108, decided in 1903; that upon the filing of maps of definite location substantially the same areas were again withdrawn for the benefit of the company; that as a consequence of the illegal withdrawals on general route and the consequent inability of settlers to acquire such lands

[81] Assignment No. 19 (R. 654), *supra,* p. 43.

prior to the filing of maps of definite location the company received benefits, lands, and values which it was not entitled to receive.

It is also alleged that on the filing of maps of definite location and the establishment of primary and indemnity limits based thereon, withdrawals of lands within the indemnity limits were made; that these withdrawals were held unauthorized and illegal in the case of *Hewitt* v. *Schultz,* 180 U. S. 139, decided in 1901;[82] that such illegal withdrawals operated while they were in force to prevent settlers from obtaining indemnity lands which they had a right to obtain and resulted in the company receiving benefits, lands, and values it was not entitled to receive.

In respect of both kinds of illegal withdrawals, the decisions holding them invalid came too late to prevent the railroad from getting the full benefit of them. Thus the place lands were withdrawn and held for the benefit of the company until the maps of definite location were filed, at which time the company got them. Had the withdrawals not been made, many of these lands would have gone to settlers, and the United States would have been compensated for many of them. The same was true of the indemnity lands which were illegally withdrawn and held for the company's benefit.

[82] The Land Office had earlier concluded that these indemnity withdrawals were invalid, and had revoked them on August 15, 1887. 6 L. D. 92–93. See also 6 L. D. 77, 80, 82, and 84.

The erroneous general route withdrawals were tremendous in area. They covered alternate sections in a strip 40 miles wide in the states and 80 miles wide in the territories. In Minnesota, by a general route withdrawal, over 1,000,000 acres were held for the benefit of the company for approximately one year. In North Dakota over 8,000,000 acres were withdrawn by a general route withdrawal on March 30, 1872. Approximately half of this was wrongfully held for the company for a year, and 4,000,000 acres were held for eight years. In Montana 11,000,000 acres were wrongfully withdrawn following the filing of maps of general location in 1872. These acres were wrongfully held in a reserved status for eight to eleven years. In Washington 7,000,000 acres were wrongfully withheld from three to fifteen years. All told, approximately 30,000,000 acres were held in a reserved status and unavailable to settlement for periods ranging from one to fifteen years, and at a time when settlements along the proposed route of the road were being rapidly made (unprinted Govt. Exs. 85, 88, 90, and 98, and Statement of Land Grants prepared by the General Land Office, pp. 14–15).

An examination of the government exhibits discloses also large acreages received by the company within areas in indemnity limits withdrawn upon the filing of the maps of definite location. In Minnesota in the first and second indemnity limits

by December 31, 1887, just after the withdrawals had been revoked by the Land Office, the company had selected approximately 700,000 acres of land. Some 600,000 acres of these had been held unavailable to homesteaders under a withdrawal for the benefit of the company made in December 1871, and not revoked until 1887, a period of approximately 16 years. The balance was withheld from settlement for a period of about four years. In North Dakota in the first indemnity limits by December 31, 1887, the company had selected over a million acres. Withdrawals had been made in 1873 and 1880. The lands were thus improperly withheld from settlers for a period of either seven or fourteen years. In Montana, by December 31, 1887, the company had selected approximately 670,000 acres of land in the first indemnity limits. Withdrawals were made in 1883, 1884, and 1885. These withdrawals were in effect three or four years. In Washington, by December 31, 1887, the company had made selections of approximately 600,000 acres which were held unavailable to settlers for a period of from two and one-half to seven years. In Oregon, by December 31, 1887, the company had made selections of approximately 200,000 acres in an area withheld from settlers for approximately two and one-half years. (Unprinted Gov. Exs. 85, 88, 90, 98, and 100, and Statement of Land Grants prepared by the General Land Office, pp. 14–15.)

The full extent of the injury to the United States, and of the unjust gain to the company may be difficult to calculate; that it is vast is beyond question. But the United States was afforded no opportunity to prove its injury, because the court below, following the master's report (R. 369), struck Subdivision XXXII from the bill (R. 411–12).

The master assigned as his reason for recommending dismissal of this subdivision that the mistake was the mistake of the Government; that it is not charged that it was induced by the fraud of the company; and that the company received no advantage from the mistakes and the Government was not injured by them (R. 369). The memorandum filed by the court below when it adopted the master's report (R. 408–11) assigns no independent reasons to support the striking out of this subdivision.

The ruling below was error, and the reasons assigned in support thereof by the master will not survive examination.

1. He states that he "cannot see at all how the erroneous construction of the grant by the officials of the government charged with its administration could under any circumstances prejudice the rights of the railroad company" (R. 369). This approach entirely overlooks the fundamental principle, stated above, pp. 200–201, that mistakes by government officials do not prejudice the government, and that where, as a result of misconstruc-

tion or mistake of law, such officials dispose of government assets, the recipient is bound, *ex aequo et bono*, to return what he has received.

2. The master continues: "It is not alleged that such withdrawals were procured by the fraud or other improper influence of the railroad company, or at its solicitation" (R. 369). This circumstance, it is submitted, is entirely immaterial. The right of the United States to recover property given away by its officers without authority of law stands on a footing entirely independent of its right to recover property obtained by fraud. See the cases cited above, pp. 200–01. This established distinction was recognized in the Act of 1929, Section 6 of which requires that the company be charged with any lands or values received in excess of the full amounts it was entitled to, whether as a result of "mistake of law or fact, or through misapprehension as to the proper construction of said grants, or as a result of fraud, or otherwise."

3. Moreover, it was intended by Congress that the errors involved in these general route and indemnity withdrawals be passed upon in the present proceeding. Section 5 of the 1929 Act provides that "the United States and the Northern Pacific Railroad Company, or the Northern Pacific Railway Company * * * shall be entitled to have heard and determined by the court * * * all * * * questions of law and fact presented to

the joint congressional committee" appointed pursuant to the Joint Resolution of June 5, 1924.

The errors in making the general route and indemnity withdrawals were presented to the Joint Committee of Congress at some length. (J. C. R. 2082–97, 3684–91, 5277–79). They were specifically brought to the attention of Congress by Mr. Colton (70 Cong. Rec. 5122, item [e]; *supra,* p. 68) as one of the reasons which prompted the declaration of a limited forfeiture in Section 2 of the 1929 Act. Yet in the teeth of the Congressional mandate that these withdrawals be looked into, heard, and determined, the master recommended, and the court below agreed, that they be ignored.

4. The ruling below has deprived the United States of the opportunity to prove the amount of the values erroneously received by the company and to charge that amount against it in the accounting. Without question, the company profited greatly as a result of the erroneous withdrawals. It saved all carrying charges on the land for one thing. It received the benefits of advancing values as the country developed. To the extent to which these values are not charged against the company in the instant accounting, as Congress intended they should be, the United States does sustain a pecuniary injury. Very definitely the United States lost what it would have received in payments from the settlers.

5. But financial injury to the United States is not essential to a remedy. It must not be over-

looked that, in making the grants, the United States was not acting as a private contractor for immediate commercial gain, but as a sovereign carrying out a public policy for the benefit of the people. See *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 409; *Causey* v. *United States,* 240 U. S. 399, 402.

It is safe to say that in 1870 no Northern Pacific grant whatever would have been made had it not been understood by Congress that provision had been and was being made for protection of the settlers. Had the proponents of the grant attempted to insert clauses authorizing these general route and indemnity withdrawals which excluded settlers, and benefited the railroad, the grant would have been denied. Yet the withdrawals were made.

Why the Government had a just interest in protecting the settlers became manifest later when the effects of the illegal withdrawals upon the settlers were made known. In the report of the Commissioner of the General Land Office submitted with Secretary Lamar's report of November 1, 1885 (H. Ex. Doc. 1, pt. 5, Vol. 1, 49th Congress, 1st Sess., pp. 155, 178–189), attention was called to the illegal withdrawals. The commissioner then stated (p. 179): "In most, if not all, cases of railroad grants premature and unauthorized withdrawals have been made, the land held sacredly reserved for the railroad, and the legal rights of settlers arbitrarily and cruelly denied. The number of settlers having indisputable legal right to the lands occupied by

them who have been forced to buy their homes of railroad companies or suffer eviction because of official declarations of superior railroad right founded upon constructive withdrawals made before any railroad right had actually been acquired, can never be ascertained, since their applications for the most part died at the local offices, and the general failure of those who applied prevented even the assertion of rights by others. * * * (p. 181): This class of withdrawals has made railroad construction dependent upon the will and convenience of the companies, for, the lands being reserved to await their pleasure, they lost nothing through delay. The object of the grants—early construction of roads and their completion within reasonable time—has thus been defeated. Roads are unfinished today for which grants were made twenty years ago and longer, and where the time for completion expired from five to fifteen years since and forfeitures have been incurred, but lands within their indemnity limits still remain withdrawn." [88]

6. In short, the United States submits that the "full accounting" contemplated by the Act of 1929 cannot be had without consideration of the amounts erroneously received by the company as

[88] Comment similar to that contained in the foregoing Commissioner's report was made by President Cleveland. His letter dated April 25, 1887, was attached to the report of the Secretary of the Interior made in response to a Senate resolution. S. Ex. Doc. No. 254, 50th Congress, 1st Sess., at page 59. The Department rule prohibiting settlers from initiating entries appears in this report at page 27.

a result of the unauthorized general route and indemnity withdrawals. The full extent of the injury to the United States and of the unjust gain to the company may be difficult to calculate, but that it is vast is beyond question. By striking out the allegations, the court below prohibited proof.

C. THE COMPANY SHOULD BE REQUIRED TO ACCOUNT FOR THE VALUE OF THE LANDS, ERRONEOUSLY PATENTED TO IT BY THE LAND DEPARTMENT, WHICH WERE EXCEPTED FROM THE GRANT OF 1864 BECAUSE INCLUDED WITHIN INDIAN RESERVATIONS CREATED BY THE FORT LARAMIE TREATY OF 1851 AND THE BLACKFOOT TREATY OF 1855

The company should be required to account to the United States for the value of over 2,800,000 acres of land patented to it by the Land Department under a mistake of law; these lands were expressly excepted from the operation of Section 3 of the Act of 1864, having been included within the limits of Indian reservations created by the Fort Laramie Treaty of September 17, 1851 (App. 5), and the Blackfoot Treaty of October 17, 1855 (App. 9).

This question was not set down for reargument. It is discussed as Point 8 in the briefs filed at the first argument (U. S. Br. 144–155; N. P. Br. 93–121; U. S. Rep. Br. 34–41).

D. IN ANY EVENT, THE COMPANY SHOULD BE REQUIRED TO ACCOUNT FOR THE VALUE OF LANDS WITHIN THE SECOND INDEMNITY BELT IN MONTANA, PATENTED TO IT ON THE ERRONEOUS ASSUMPTION THAT LANDS WITHIN THE CROW INDIAN RESERVATION AS DIMINISHED BY THE TREATY OF 1868 WERE SUBSEQUENT LOSSES

Even if the United States should not prevail on the main Indian point, the company must never-

theless account to it for the value of 1,198,813.10 acres (R. 597, 786) within the second indemnity belt in Montana patented to it by the Land Department under a mistake of law. The extent to which the second indemnity belt in Montana could be resorted to was limited by the Joint Resolution of 1870 to the total amount of the subsequent losses in Montana. The alleged mistake lay in treating primary lands in the Crow Reservation, diminished by the Treaty of May 7, 1868 (App. 23), as lost subsequent to July 2, 1864. By the 1868 Treaty the Indians ceded to the United States all of their territory except that delimited therein. As to the delimited area, the treaty merely confirmed a title in the Indians which had existed since the making of the Fort Laramie Treaty of 1851 (App. 5). The Crow losses were, therefore, prior losses and not subsequent losses. By reason of the mistake the company was permitted to select and obtain patents for 1,198,813.10 acres in the second indemnity belt in Montana in excess of the maximum area it could rightfully obtain therein if the Crow losses were not subsequent losses. This excess area should be accounted for by the company.

This question was not set down for reargument. It is discussed as Point 9 in U. S. Br. 156–66, and is referred to in the company's argument on the general Indian point, N. P. Br. 93–121.

E. THE COMPANY SHOULD BE REQUIRED TO ACCOUNT FOR THE VALUE OF THE ADDITIONAL LANDS WHICH IT RECEIVED BY REASON OF THE EXTRA MILEAGE ADDED BY THE UNNECESSARILY CIRCUITOUS ROUTE FOLLOWED IN WASHINGTON

The company should be required to account to the United States for the value of 1,400,000 acres of lands which it received, over and above the amount to which it was rightfully entitled, by reason of having built the railroad by an unnecessarily circuitous route, 82 miles longer than the direct and most eligible route between Lind and Ellensburg in Washington.

This question was not set down for reargument. It is discussed as Point 5 in U. S. Br. 116–20; N. P. Br. 87–93; and U. S. Rep. Br. 32–34.

F. THE VALUE OF THE LAND GRANT AS A WHOLE AND THE ADDITIONAL VALUES RECEIVED UNDER THE MT. RAINIER PARK EXCHANGE ACT

1. It was alleged in Subdivision XIX (R. 36) that the total original cost of constructing so much of the road as was actually completed was approximately $68,000,000, and that the company had received from the granted lands values in excess of $200,000,000, "much of which was wrongfully received as in this bill elsewhere alleged." The master considered these allegations to be immaterial and recommended that they be stricken (R. 387). The court agreed (R. 411–12); the United States assigned error. Assignment No. 12 (R. 653), *supra*, p. 42.

It is believed that the facts stated in the cited subdivision cannot be dismissed as "wholly immaterial" (R. 387), but that they are proper for consideration in an accounting such as the present one, where the rights of the parties are to be determined upon equitable principles.

2. It was alleged in subdivision XXXV (R. 75) that, under the provisions of the Mount Rainier Park Act of March 2, 1899, c. 377, 30 Stat. 993 (App. 113), Congress, acting upon erroneous information which had been presented to it, enabled the company to relinquish to the United States thousands of acres of lands of low value, and to obtain from the United States a comparable acreage of lands of much higher value. The master recommended that the subdivision be stricken, on the ground that the Attorney General could not call upon the courts to question the wisdom of Congress legislating within its conceded powers (R. 329–34), and the court adopted the recommendation (R. 411–12). The United States assigned error; Assignment No. 20 (R. 654), *supra*, p. 43.

Inasmuch as the question of the Mount Rainier Park Act was investigated at length before the Joint Committee (J. C. R. 26, 377–78, 687, 424–26, 1005–17, 1057–88, 2339–44, 2549–52, 3708–12, 5129–32, 5435–36, 5477–78), this is a case of Congress itself ordering that its action based on mistake be inquired into, for Section 5 of the 1929 Act specifically directed the Attorney General to present to

the court, and the court to determine, every matter that had been before the Joint Committee. And, where, as here, the company is pressing a claim for compensation for lands alleged to have been wrongfully withheld from it, it seems at least fair that in the full and complete accounting required by the Act, the court consider any excess values which have been received by the company, even though those values were sanctioned by an Act of Congress.

3. Assignments 12 and 20, discussed in this section, are not pressed by the United States.

V. EVEN IF THE COMPANY IS ENTITLED TO COMPENSATION FOR THE INDEMNITY LANDS RETAINED BY THE UNITED STATES, IT IS NOT ENTITLED TO COMPENSATION IN THE MEASURE OR TO THE AMOUNTS AWARDED BELOW

If the Court sustains our contention, made in Point III, pp. 111–98, *supra,* that the company has so far and so substantially breached its contract as to be entitled to no further performance from the United States, the question of the company's compensation will have been settled: it will receive no compensation. In that event, there is no need for the Court to consider this Point. The present topic becomes material only in the event that the Court should hold that the company is entitled to further performance on the part of the United States, and that Congress was in error in declaring forfeited the company's selection claims.

On the assumption that the company is entitled to compensation, the question here is to determine according to what standards such compensation should be awarded. We contend that the lower court erred, both as to the standard which it adopted, and as to specific items for which it adjudged compensation.

The errors of the lower court will become apparent when the *Forest Reserve* case, 256 U. S. 51, is analyzed. That decision is basic on this phase of the case.

A. THE RATIO DECIDENDI OF THE FOREST RESERVE CASE IS THE FAMILIAR PRINCIPLE OF CONTRACT LAW THAT A PARTY MAY NOT BY ITS OWN ACT DISABLE ITSELF FROM PERFORMING ITS CONTRACT

The *Forest Reserve* case, *United States* v. *Northern Pac. Ry. Co.*, 256 U. S. 51, held that the legality of the Government's forest reserve withdrawals depended on whether, when they were made, there was sufficient indemnity land available to satisfy losses which had occurred within the place limits of the company's grant and which had not then been satisfied. The Court held that, assuming that the land available as indemnity which remained within the indemnity limits was not enough to make up for unsatisfied losses in the place limits, the United States could not deprive the company of its right to such land by setting it aside for forest purposes. The heart of the decision is in the following paragraph from Mr. Justice Van Devanter's opinion (pp. 64–65):

When the grant was made by the act and resolution it was thought that the indemnity limits as therein defined contained lands largely in excess of what would be required to supply losses within the place limits, and hence the provision in § 6 under which, as construed by the land officers and this court, all lands in the indemnity limits were to be and remain subject to the operation of the preemption and homestead laws, save as the odd-numbered sections should be taken out of their operation by indemnity selections. Under that provision, however, the lands available for indemnity were diminished much more rapidly than was expected; but as the provision was one of the terms of the grant the company must submit to whatever of disadvantage results from it. This the company frankly recognizes, for in its brief it says: "It was a part of our contract that, until selected, lands within the indemnity belt should be open to settlement under the homestead and preemption laws"; and also, "The question here is not whether in the face of the deficiency the settler [before selection] may acquire rights superior to ours, for we concede that he may." But that provision gives no warrant for thinking that, after the company has earned the right to receive the lands comprehended in the grant, the Government is free to reserve or appropriate to its own uses lands in the indemnity limits which are required to supply losses in the place limits. We say "required" because we perceive no reason to doubt that

> lands in the indemnity limits may be so reserved or appropriated where what remains is sufficient to satisfy all the losses.

It is the last sentence which is, as we believe, controlling here. But in order to ascertain its precise scope, it must be considered in the light of other settled principles. We submit that the errors of the court below, in respect of the specific lands on account of which compensation is awarded, are very largely due to a failure to extract the real holding of that case.

First of all, the Northern Pacific grant was a place grant rather than a quantity grant; it was a grant of public lands bounded by lateral limits within specified distances from the road, rather than a grant of a definite quantity of public land per mile of constructed road. Being a place grant, there was no guaranty by the United States that any specific quantity of land would be received.[84] The effect of the indemnity clause, as this Court has pointed out, is akin to the operation of the residuary clause in a will. See *United States* v.

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[84] See *Sioux City & St. P. R. R. Co.* v. *United States*, 159 U. S. 349, 362:

"The court below well said that there was no guaranty by the United States that the quantity of land covered by the grant should equal any fixed number of acres either for the construction of the entire road or any portion thereof, and that the exceptions named in the act clearly show that the company undertaking the construction of the line of the proposed railway was to get only the quantity of land that was ultimately found to be, in fact, covered by the grant."

Southern Pac. R. R. Co., 223 U. S. 565, where it was said (*per* Holmes, J., at 570):

> An indemnity grant, like the residuary clause in a will, contemplates the uncertain and looks to the future. What a railroad is to be indemnified for may be fixed as of the moment of the grant, but what it may elect when its right to indemnity is determined depends on the state of the lands selected at the moment of choice. Of course the railroad is limited in choosing by the terms of the indemnity grant, but the so-called grant is rather to be described as a power.

Otherwise stated, the company is entitled to exercise its power of selection out of such land as might be left in the indemnity limits.

This follows from the second point to be emphasized here, that the rights of settlers in the indemnity limits were superior to those of the company prior to selection. It seems sufficient to cite the quotation from the *Forest Reserve* case, *supra*, pp. 219–20; *Hewitt* v. *Schultz*, 180 U. S. 139; *Southern Pac. R. R. Co.* v. *Bell*, 183 U. S. 675.

Finally, the United States could not legally have withdrawn the lands within the indemnity limits for the benefit of the company, so as to insure that the company's grant should not be deficient. The illegality of any such withdrawal was squarely ruled by this Court in *Hewitt* v. *Schultz*, 180 U. S. 139.

These propositions being established—that there is no guaranty, that the rights of settlers are supe-

rior, and that a withdrawal for the company's benefit is illegal—the *Forest Reserve* case can be no more than an application of the familiar principle of the law of contracts that a party cannot by his own act disable himself from performing his contract. Impossibility self-induced is not available as an excuse. *Roehm* v. *Horst,* 178 U. S. 1, 18, 19; *Central Trust Co.* v. *Chicago Auditorium Ass'n,* 240 U. S. 581, 589; *Chicago & E. I. R. R. Co.* v. *Collins Co.,* 249 U. S. 186; *P. N. Gray & Co.* v. *Cavalliotis,* 276 Fed. 565 (E. D. N. Y.), aff'd, 293 Fed. 1018 (C. C. A. 2d); *The Henry W. Cramp,* 20 F. (2d) 320 (C. C. A. 3d); *H. Muehlstein & Co.* v. *Hickman,* 26 F. (2d) 40, 43 (C. C. A. 8th); 6 Williston, *Contracts* (Rev. Ed.) § 1959. Though the company cannot complain if settlers deprive it of indemnity lands, it can complain if the Government does so. The United States is not free to reserve or appropriate to its own uses lands in the indemnity limits which are *required* to supply losses in the place limits; and "we say 'required' because we perceive no reason to doubt that lands in the indemnity limits may be so reserved or appropriated *where what remains is sufficient to satisfy all the losses.*" *Forest Reserve* case at 65. [Italics added.]

The injury to the company is not that its freedom to select indemnity lands within the indemnity limits has been curtailed; if that were so, the United States could never withdraw for its own

purposes a single acre of land within the indemnity limits. The *Forest Reserve* case expressly holds the contrary. The true basis of the injury is that the United States has, by its own act, cut down the acreage to which the company would have been entitled; and the extent of the injury is therefore the extent to which the remaining indemnity lands are insufficient to satisfy the place losses.

B. THE AWARD MADE BELOW IS ERRONEOUS BECAUSE IT DISREGARDS AND MISAPPLIES THE RULE OF THE FOREST RESERVE CASE

Because the court below misapprehended the ruling in the *Forest Reserve* case, it allowed the company compensation far in excess of any loss which it sustained by reason of the forest withdrawals. The basic error of the court below, in determining whether any of such withdrawals were illegal, was its refusal, to ascertain "where what remains is sufficient to satisfy all the losses." 256 U. S. at 65. The resulting errors may be grouped into three categories: (1) The court refused to consider unsurveyed lands remaining; (2) it refused to consider subsequent restorations to the public domain, and subsequent surveys of lands which were unsurveyed at the time of the withdrawals; and (3) it held that any withdrawals which left insufficient surveyed lands to satisfy all the losses were wholly invalid, and not invalid simply to the extent of the deficiency (R. 611, 612, 613). These errors will be dealt with eparately below, pp. 227–38.

The application of these rulings of the court below will perhaps best be understood by reference to the specific instances involved.

On March 1, 1898, the United States made a withdrawal of 163,280 acres in the second indemnity belt in Idaho. After it had been made, there remained in that belt 270,783.37 acres of public land, of which 25,500.72 acres were surveyed. The unused losses satisfiable in that belt aggregated 31,141.20 acres. (Govt. Exhs. 94, 95, 96, unprinted Narrative Statement, pp. 210–12.) Thus, the surveyed lands were insufficient by 5,640.48 acres to satisfy the losses, but the surveyed and unsurveyed lands together were in excess of ten times the amount required to satisfy the losses. If unsurveyed public lands could be considered, as we contend, then the withdrawal of March 1, 1898, was a valid withdrawal when made, and, hence, would be valid still. The court below, however, declining to take unsurveyed lands into consideration, held the withdrawal invalid (R. 612) and awarded compensation to the company for 19,680 acres embraced by the withdrawal of 1898 (Schedule D attached to decree, R. 644).[85]

On March 31, 1900, less than three years after the withdrawal was made, the area of surveyed

[85] The company had only 23,364 acres of unsatisfied losses satisfiable in this belt. It used them for the selection of 19,680 acres in the 1898 withdrawal and used the remainder for the selection of lands in withdrawals made in 1906, 1907, and 1915 (unprinted N. P. Exh. F, R. 778).

lands in the second indemnity belt had been increased, either as a result of subsequent surveys or by restorations to the public domain, to 47,513.59 acres. At that time the unused losses satisfiable in that belt were 30,118.67 acres. Thus, on December 31, 1900, the vacant surveyed lands in the belt were alone sufficient to satisfy all the losses. A similar situation continued until after the withdrawal of March 21, 1905, was made. (Govt. Exhs. 94, 95, 96, unprinted Narrative Statement, pp. 210, 212.) That withdrawal, involving 83,653.38 acres in the same area, the second indemnity belt in Idaho, was held valid (R. 612), because after it was made there remained more surveyed nonmineral public lands in that belt than the unused losses satisfiable therein.

Therefore, even if the 1898 withdrawal should be held invalid under the rule that only surveyed lands can be counted, it would have been valid in any event if subsequent restorations and subsequently surveyed lands were taken into consideration. But the court below refused to consider matters subsequent to the withdrawal, and so, notwithstanding the facts recited, held the March 1, 1898, withdrawal invalid.

Another feature of this particular withdrawal should be mentioned here. Second indemnity belts were laid down only on request of the company (Gov't Exh. 69, R. 805). The second indemnity belt in Idaho was laid down in 1906 long after the withdrawal of 1898 had been made. (Unprinted

Narrative Statement, p. 258.) These circumstances raise the question whether the company can now be heard to complain of the 1898 withdrawal in an indemnity belt which the company itself delayed having laid down.

The withdrawals in the second indemnity belt in Montana also illustrate the application of the court's rulings. All the withdrawals there, except one made in 1892, were held invalid (R. 612, 644). The court allowed the company to choose 170,326.73 acres out of an area of 714,460.72 acres withdrawn by means of twenty-four withdrawal orders made between the years 1898 and 1921, and awarded compensation to the company on account of some lands in each of twenty of such withdrawals.[86] If unsurveyed lands had been taken into consideration, all withdrawals in that belt made in the years 1898, 1899, 1900, 1901, and perhaps 1902 would have been held valid. The lower court awarded compensation (R. 644) for 16,480 acres in withdrawals made in 1898; 3,209.74 acres in withdrawals made in 1899; 14,521.60 acres in withdrawals made in 1900; 13,961 acres in withdrawals made in 1901; and 30,493.70 acres in withdrawals made in 1902 (Schedule D attached to decree). This belt was not established until 1903, after all the withdrawals just referred to had been made.[87]

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[86] For the dates and areas of the several withdrawals, see R. 494–95.

[87] If the Court upholds our contentions on the so-called Crow point, that lands in the Crow reservation were prior

We proceed now to a discussion of the rules applied by the court below.

1. It was error to exclude unsurveyed lands from consideration in determining the validity of the withdrawals, because, to the extent that such lands remained unappropriated within the indemnity limits, the United States had not disabled itself from performing its contract[88]

The effect of the ruling below is to hold totally invalid every withdrawal of lands in the indemnity belts, if the losses exceeded by a single acre the remaining surveyed public lands in the belt, and this without regard to the amount of unsurveyed lands remaining. We submit that this was error, for the very obvious reason that, so long as unappropriated unsurveyed lands remained within the indemnity limits, the United States had not disabled itself from performing its contract. It had not by its own act diminished the acreage which the company might obtain.

Unsurveyed lands within the indemnity limits were patentable on compliance with the terms and conditions stated in the granting Act and Resolution. Surveying was a step in the procedure. It

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losses and should not be included in computing the extent to which resort to the second indemnity belt in Montana could be had (see Point V (C) (3), below, pp. 240–41, not set for reargument), it will be unnecessary to consider the validity of second indemnity withdrawals in Montana under the present heading.

[88] Assignments 32 and 33 (R. 655–56), *supra*, p. 46.

did not affect the character of the lands. If the United States had the lands, and the selection was delayed only by the absence of surveys, then the remedy was to take the necessary steps to secure the surveys, not to invalidate the withdrawals or to hold that they create a deficiency when in fact they left an adequate amount of lands within the described limits from which the selection could be made.

This Court in the *Forest Reserve* decision remanded the case for a determination of the amounts of land available as indemnity. The court below applied the word "available" as if it meant "at hand, ready to be taken without going through the preliminary of a survey" (see R. 612–613). It is submitted that "available" has reference to all land which fits the description in the granting Act and Resolution, which make no requirement as to whether the lands are to be surveyed or unsurveyed. The unsoundness of the rule applied below becomes apparent when it is recalled that the court below invalidated the 1898 second indemnity withdrawal in Idaho because sufficient lands were not "available," and then proceeded to hold legal a withdrawal made seven years later in the same area because lands at that time were available (R. 612). This is obviously a most peculiar definition of availability.

The construction for which we contend is supported not only by the basic principle already

discussed, but is fortified as well by analysis of the decided cases and by the uniform practice of the General Land Office.

(a) We have already quoted the criterion established in the *Forest Reserve* case for determining the legality or otherwise of a withdrawal, *viz.*, "where what remains is sufficient to satisfy all the losses." The Court in that case then went on to refer to *St. Paul & Pac. R. R. Co.* v. *Northern Pac. R. R. Co.*, 139 U. S. 1, 19. On this point, the latter case held only that it appeared that there were actual deficiencies, and that even in the absence of selection, the indemnity lands did not pass to another railroad under a subsequent land grant. There, it is to be noted, it was said (p. 18) that the rights became fixed before the President had caused the lands to be surveyed. This amounts to holding that the unsurveyed lands were "available" for selection.[9]

The *Forest Reserve* case itself contains a striking fact (p. 61) which supports our contention as to the meaning of availability. The temporary withdrawal there involved was made in January 1904, before the lands were surveyed. The survey was made thereafter, followed by a selection, which in turn was followed by the final proclamation adding the lands to the Gallatin National Forest. If,

[9] Such a holding, of course, has nothing to do with the procedure to be followed in making the selection, which required identification by a survey.

as the court below held here, the lands are not "available" until they have been surveyed, then the withdrawn lands, not having been surveyed, were not available for selection, and thus the withdrawal deprived the company of no right. Plainly that is a false line of reasoning.

(b) Moreover, it was and is the uniform practice of the General Land Office, in determining the existence of a deficiency in railroad land grants, to charge to the grantee all vacant public lands in the indemnity limits, whether surveyed or not (unprinted Narrative Statement, p. 205; unprinted Govt. Exhs. 69, 71, found in unprinted Narrative Statement at pp. 187, 191, 195, 197, 198; J. C. R. 372, 380, 683, 690, 4219).

As stated in one Departmental ruling, involving the adjustment of the Santa Fe grant (unprinted Narrative Statement, pp. 391–93 at 392):

> In the adjustment of railroad grants having indemnity limits such as the grant here in question, it has always been the uniform and accepted rule, to charge against the grant as available for indemnity all lands within the indemnity limits which are vacant and applicable and not only those that are available for immediate selection. While it may be said that the unsurveyed lands in the indemnity limits are only potentially available, they are nevertheless applicable to the grant, subject to possible future selection, and until disposed of adversely

to the company it is only proper to treat them as available in the adjustment.

(c) There is a final reason why unsurveyed lands should not be excluded from consideration in the present connection, and that is the circumstance that the unsurveyed condition of the lands was not attributable to any fault on the part of the United States.

The United States assumed an obligation to survey lands along the route of the road and within forty miles (Section 6 of the 1864 Act, App. 43), but it did not assume any obligation to survey lands beyond that distance. The lands in the second indemnity belts of Montana and Idaho, where the application of the rule now under consideration is principally significant, are more than forty miles from the road and are therefore not within this statutory obligation. It was to be expected that the survey of lands in the indemnity limits would keep pace with the normal progress of the public surveys, but the United States owed no duty to proceed there at a more rapid rate. Since the United States was bound to survey, not only the 40,000,000 acres of lands in the primary limits of the Northern Pacific grant, but also the millions of acres in other grants and in the public domain generally, it was to be expected that this would be a time-consuming task. This was known to the company when the grants were accepted, and they were accepted with that understanding. *Oregon &c. R. R. Co.* v. *United States*, 189 U. S. 116, 118.

The company was required by the Act of July 15, 1870 (App. 60) to pay the costs of survey before patents could be obtained. In 1873, a large area of land had been patented to the company, but survey fees amounting to $26,020.53 had not been paid. In 1874 the Land Office notified the company that no more patents would be issued until all delinquent survey fees had been paid. The fees were not paid until 1882 and then only under protest (unprinted Narrative Statement, pp. 277, 279). The company continued to resist the obligation to pay survey fees until the Act of July 15, 1870, was upheld by this Court in the case of *Northern Pacific R. R. Co.* v. *Traill County*, 115 U. S. 600, decided December 7, 1885.[90] Thereafter the surveys proceeded in due course. In order to hasten them, Congress passed the Acts of August 20, 1894, c. 302, 28 Stat. 423, and February 27, 1899, c. 205, 30 Stat. 892, authorizing the company to advance the costs of survey and thus expedite its acquisition of lands under the grants. Notwithstanding the enactment of these statutes, the company applied for and obtained the survey of only 166,583.08 acres in the first indemnity limits and 66,041.92 acres in the second indemnity limits of the entire grant between the years 1899 and 1905, inclusive (Govt. Exh. 232, unprinted Narrative Statement, p. 327). The

[90] There it was said (p. 610): "We are aware of the use being made of this principle by the companies who, having earned the lands, neglect to pay these costs [of survey] in order to prevent taxation."

United States then undertook to expedite the surveys. Congress passed the Act of June 25, 1910, c. 406, 36 Stat. 834, empowering the Secretary of the Interior to demand from the company deposits covering cost of survey, and directing that, if such deposits were not made within 90 days, the Attorney General be requested to institute forfeiture proceedings. Thereupon the company asked to be relieved of the drastic provisions of this Act and to be permitted to operate under the provisions of the Act of 1899. This request was granted by the Land Office (unprinted Narrative Statement, p. 329).

These facts indisputably fix the blame on the company for the delay in surveying lands within the indemnity limits. The United States was not at fault. Although the company alleged in its answer (Subd. XXXIV, R. 243) that through a long period of years the United States neglected to make surveys of lands within the place and indemnity limits, counsel for the company announced at the trial (unprinted Narrative Statement, p. 274) that there was no issue before the court "as to whether there was delay in surveying indemnity lands by reason of the fault and neglect of the United States," and that the company "isn't seeking to prove that the Government was negligent in making surveys."

We submit that, since the company was to blame for the lack of surveys in the indemnity limits, it is not now in a position to contend that unsurveyed

lands should be excluded from consideration in testing the validity of withdrawals.

2. In any event, it was error to disregard subsequent restorations and surveys, because, to the extent that surveyed lands were subsequently available for selection, the United States was once more in a position to perform its obligations under the contract [91]

Even if the Court should reject our contention, that unsurveyed lands remaining within the indemnity limits must be considered in determining the validity of withdrawals, we submit that, in any event, the withdrawals should be treated as valid if at any time after they were made there were sufficient surveyed lands in the respective indemnity limits to satisfy all the losses satisfiable therein.

The situation in respect of the 1898 and 1905 withdrawals in the second indemnity belt in Idaho, set out at pp. 224–26, *supra*, illustrates in striking fashion the unreasonableness of the rule adopted below. Notwithstanding the fact that, in less than three years after the date of the 1898 withdrawal there were more surveyed lands in the second indemnity belt than were required to satisfy the losses, and notwithstanding the fact that the 1905 withdrawal was held valid because of the excess of surveyed lands then available, the court held the entire 1898 withdrawal invalid.

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[91] Assignments 36 and 38 (R. 656), *supra*, pp. 46–47.

The ruling below on this point cannot be sustained. The only withdrawals for which compensation may be awarded are those which diminished the acreage which the company could obtain below what it was entitled to receive. Here the company has not been harmed. By later restoring the land to the public domain, or by later causing it to be surveyed, the United States once more placed itself in a position where it was enabled to perform its contract, where more surveyed lands than required were available. Any disability to perform caused by the withdrawal, any lack of the surveyed lands required to satisfy the losses, had been removed by the subsequent restorations. As the company did not have title to the indemnity lands prior to selection, *Hewitt* v. *Schultz,* 180 U. S. 139; *Southern Pac. R. R. Co.* v. *Bell,* 183 U. S. 675, it cannot claim compensation, based on damage suffered, until and unless it can show that, at the time selection was made, the United States did not have an adequate amount of surveyed lands to meet the selections.

To contend otherwise, to rule as the court below did, is the same as saying that a bank is in default even when it pays a depositor on demand, simply because it would not have been able to meet that demand the day before it was made.[92]

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[92] This contention also involves, in one aspect, a different contract principle. The *Forest Reserve* case is subject to the interpretation that the critical time is the date of the withdrawal; in other words, that a withdrawal which creates a potential deficiency is invalid. This is really the doctrine

3. It was error to hold that withdrawals which left insufficient lands to satisfy the losses were wholly invalid, instead of invalid only to the extent of the deficiency [93]

The court below consistently held invalid *in toto* any withdrawal which resulted in a deficiency under the rules it applied, even where the deficiency was only a small percentage of the total withdrawal. The 1898 withdrawal in the second indemnity limits in Idaho, set out at pp. 224–26, *supra*, is a case in point. The court then went on to hold that, where a withdrawal was wholly invalid under these rulings, the company was entitled to select, from the total acreage of such a withdrawal, lands in the amount of the deficiency for which it might claim compensation. Conclusion (e), R. 613.

This ruling, we submit, was likewise error, and likewise misapplies the principle of the *Forest Reserve* case. A simple illustrative example, couched in round figures, will, we believe, serve to demonstrate the nature and extent of the mistake.

Suppose that the grant in a particular state is deficient to the extent of 100,000 acres, representing losses which may be satisfied in the second in-

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of anticipatory breach. Under the present heading, we are urging that the critical time is the time of selection. If at that time there is no deficiency, the withdrawal should be valid. That is to say, we are suggesting that the determinative factor is actual breach.

[93] Assignments 37 and 39 (R. 656), *supra*, pp. 46, 47.

demnity belt. The amount of second indemnity lands available for selection—and no point is here made of the meaning of available—is 150,000 acres. At this point the United States withdraws 50,000 acres of indemnity lands for forest purposes. Clearly the withdrawal is valid; what remains is sufficient to satisfy the losses. It is true that the company's liberty to select particular tracts has been curtailed, but that would be true even if the withdrawal had included only 1,000 acres or even a single acre; and the *Forest Reserve* case holds that the right to make withdrawals exists so long as no deficiency results.

Now suppose, however, that the withdrawal involves 50,500 acres. Under the rule adopted below, the entire withdrawal is illegal, and the company is entitled to compensation for any 500 acres of the 50,500. This means that it may select the most valuable tracts, though obviously it might well have received the least valuable, without any cause for legal complaint, if the withdrawal had been smaller by only 500 acres.

We submit that, in the second case put, the withdrawal was invalid only to the extent of the deficiency. After all, the remedy for an excessive withdrawal was to cut it down, not to revoke the entire withdrawal. The company was injured only as to the extent of the deficiency.

Nor is there any difficulty in ascertaining a basis for compensation under the rule contended for.

While the statement that a particular 50,500-acre withdrawal is invalid only to the extent of 500 acres naturally prompts the query, "Which 500 acres?" we do not think that this imports a dilemma. In such a case, the company is entitled to compensation for the 500 acres, computed on the average valuation of the entire 50,500-acre tract. This rule, it is true, deprives the company of a right of choice. But it is sound, none the less, because the gravamen of the injury is not the curtailment of the right to select but the occurrence of a deficiency.

C. THE AWARD BELOW WAS EXCESSIVE AS TO A NUMBER OF SPECIFIC ITEMS

The court below awarded the company compensation in respect of 1,453,061.02 acres of withdrawn indemnity lands (R. 642) and directed that the United States issue patents to the company in respect of 45,178.60 acres of indemnity lands already selected (R. 634, 643). Apart from the question just discussed, of the correct standard for determining compensable losses, the award made is excessive as to a number of specific items.

1. The award must be reduced by 1,021,695.73 acres, representing indemnity selections based upon fraudulently classified base lands

The award made is excessive, for one thing, to the extent of 1,021,695.73 acres (R. 778, N. P. Exh. E). The company's claim to compensation was to that extent based upon an asserted loss of an equal number of acres of mineral lands within the place

limits, the alleged mineral character of which is based solely on a false and fraudulent classification procured by the company (Subd. XXVIII, R. 60).

This point was not set down for reargument. It is discussed as Point 1 in U. S. Br. 46–58; N. P. Br. 59–86; U. S. Rep. Br. 4–12.

2. For another reason, the award must be reduced by approximately 1,011,000 acres, representing lands not available for indemnity selections by the company because non-agricultural

Apart from the question of fraudulent mineral classification, the award made is excessive to the extent of about 1,011,000 acres, representing nonagricultural lands (R. 625; R. 523, Finding V (a); N. P. Exhs. 144, 146, not printed). Such lands were not available for indemnity selections on the mineral base offered, and hence the company has not been damaged by their withdrawal. It may be noted here that the company does not have any substantial amount of unassigned nonmineral base to assign to these lands.[94]

The area involved here is substantially the same as in Point V (C) (1), just preceding. There the

[94] It will be recalled, see p. 8, *supra*, that whereas "other lands" were available as indemnity for nonmineral losses, only "agricultural lands" could be selected as indemnity for mineral losses. Consequently, if no agricultural lands were available, the company's grant was necessarily diminished by the amount of the mineral losses. Compare *Sioux City & St. P. R. R. Co.* v. *United States*, 159 U. S. 349, 362; *United States* v. *Southern Pac. R. R. Co.*, 223 U. S. 565, 570, quoted at pp. 220, 221, respectively.

character of the base is attacked; here the contention is that the indemnity lands are not of the character that could be selected, even with valid mineral base.

The present point was not set down for reargument. It is discussed as Point 3 in U. S. Br. 66–96; N. P. Br. 160–71; U. S. Rep. Br. 18–26, 51–64.

3. The award must also be reduced by 170,326.73 acres, representing selections in the second indemnity belt in Montana based on the erroneous assumption that lands within the Crow Indian Reservation as diminished by the Treaty of 1868 were subsequent losses

The area for which compensation is awarded is also excessive to the extent of 170,326.73 acres in the second indemnity belt in Montana (R. 613, 644, R. 778, N. P. Exh. F). If as we contend (see Point IV (C), *supra*, p. 213), lands within the primary limits of the grant and within the reservations created by the Fort Laramie Treaty of 1851 and the Blackfoot Treaty of 1855, were excepted from the grant, such losses were prior losses and could not be included in computing the amount to which resort might be made to the second indemnity belt in Montana. The company has, therefore, already received more lands in such belt than it could rightfully obtain, and it should not now be awarded compensation for more lands.

Likewise, if, as contended in any event (see Point IV (D) *supra*, pp. 213–14), the cession of May 7,

1868, by which the Crow Reservation provided for in the Treaty of 1851 was diminished, was merely confirmatory of an Indian title which was in existence on and prior to July 2, 1864, the area within such diminished reservation was a prior loss and could not be taken into consideration in determining the extent to which resort might be made to such second indemnity belt. The result is that the company has already received 1,198,813.10 acres more in the second indemnity belt in Montana than it could rightfully obtain (R. 597, 786). Obviously, therefore, it would be error now to award compensation for 170,326.73 acres more in the same limits.

The present point involves the company's right to compensation from the United States; Point IV. (D) *supra,* the right of the United States to compensation from the company. Both turn on the character of the losses in the Crow Reservation, a subject not set down for reargument. See Point 9 in U. S. Br. 156–66, and the general references in N. P. Br. 93–121.

4. The award must likewise be reduced by 32,483.92 acres, representing lands within the Northern Cheyenne Indian Reservation for which no compensation was authorized by the Act of June 25, 1929

The award made is likewise excessive to the extent of 32,483.92 acres within indemnity limits in the Northern Cheyenne Indian Reservation in Montana (R. 628, 468–70, 524, 643–44, 608, Govt.

Exh. 146; R. 778, N. P. Exh. F). The contention here is that these lands were virtually the property of the Northern Cheyenne tribe, and hence were not within a "Government reservation" within the contemplation of the Act of June 25, 1929. Since compensation was authorized by that Act only in respect of lands included within Government reservations, the award as to this item cannot be sustained.

This point was not set down for reargument. It is discussed as Point 10 in U. S. Br. 166–70 and in N. P. Br. 158–59.

5. The award must further be reduced by 2,480.91 acres on which homesteaders made entries before June 5, 1924, for which no compensation was authorized by the Act of June 25, 1929

The award made is further excessive to the extent of 2,480.91 acres (R. 628), representing lands on which homesteaders had made entries prior to June 5, 1924, and for which they received patents after that date. Inasmuch as the title acquired by a homesteader relates back to the date of his filing or entry, such lands were not in a withdrawn status on June 5, 1924[95] which status is an essential requisite for compensability under the Act of June 25, 1929.

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[95] June 5, 1924, it will be recalled, was the date of the Joint Resolution (App. 138) which suspended the issuance of patents and authorized the Congressional investigation of the grants.

This point was not set down for reargument. It is discussed as Point 13 in U. S. Br. 181–82; N. P. Br. 157–58; and U. S. Rep. Br. 45.

6. The award is excessive as to the acreage of indemnity lands for which it directs that patents be issued [96]

The court below decreed that, upon payment by the company of the usual patent and survey fees, patents to certain lands aggregating 428,986.68 acres (R. 634) should be issued to the company.

Of this acreage, 383,808.08 acres are place lands, title to which passed by operation of the grant, but which have not heretofore been patented, principally because of the failure of the company to pay survey and transfer fees. No objection is made as to this part of the decree. The remaining 45,178.60 acres are indemnity lands. No objection is here made as to one 340-acre tract, covered by stipulation,[97] but the United States does object as to the balance of 44,838.60 acres of indemnity lands.

Of course, if the company is not entitled to satisfaction of any further selection claims, as we urge in Point III, *supra,* pp. 111–98, it is not entitled to patents to any such lands. The question here presented is whether, if the company is basically en-

[96] Assignment 52 (R. 658), *supra*, p. 48.

[97] The tabulation (R. 634) includes one item, "mineral indemnity in place limits" 340 acres, which is included in paragraph "Second" of the stipulation (R. 769).

titled to compensation on account of withdrawn lands within the indemnity limits, there are other reasons which disentitle it to patents. We submit that there are.

(a) The lower court held (by sustaining the government's exception No. XLIV to the master's second report, R. 570, 577) that in order to claim compensation for indemnity lands, the company must present a tract-for-tract assignment of base. There has been no appeal from this holding. The company has not shown any tract-for-tract assignment of base to the indemnity lands comprising the 45,178.60 acre area. There is, therefore, no basis for its claim to patents at this time.

(b) Even if a tract-for-tract assignment of base had been made, the base assigned to lands within the first and mineral indemnity limits, aggregating 30,320.36 acres (R. 634), would necessarily have consisted principally of losses growing out of the fraudulent mineral classification. If, as we contend (see Point V (C) (1), *supra,* pp. 238–39), that classification cannot be upheld, no proper assignment of base can be made as to these lands, and therefore the company has no valid claim to them.

(c) Of the lands here involved, 13,933.73 acres are located in the second indemnity belt in Montana (Schedule A attached to the decree). If, as we contend (see Point IV (D), *supra,* pp. 213–14), the company has already received more lands in this belt than it was entitled to receive under the

visions of the grant, it is obviously not entitled
ny more.

HE COURT BELOW PROPERLY REFUSED TO ALLOW COM-
NSATION IN RESPECT OF THE SO-CALLED TACOMA
ERLAP

he court below refused to award compensation
he company for 196,761.66 acres in the second
emnity belt as erroneously laid down opposite
1870 grant in Washington (R. 620). The com-
y appealed; its appeal is No. 4, present Term.

he basis of the court's holding was that since
area within the overlapping primary limits of
grant for the Tacoma-Pasco line and the
oma-Portland line was not a loss to the latter
a second indemnity belt opposite that line in
shington was not authorized under the provi-
s of the Joint Resolution of May 31, 1870, and
the company was, therefore, not entitled to
pensation for any withdrawn lands in such
(R. 620). The United States contends that this
ng was right, but urges two additional grounds
ts support. One is that no second indemnity
was ever authorized for the line between Ta-
a and Portland; the other is that this line has
ed out to be a branch only, and so is expressly
ed any indemnity right.

he Tacoma overlap point was not set down for
gument. It is discussed in the company's two
fs in No. 477, 1939 Term; U. S. Br. 201–24; and
. Rep. Br. 49–50.

E. APART FROM ALL OF THE FOREGOING THE COMPANY IS NOT ENTITLED TO ANY COMPENSATION BECAUSE IT CANNOT PROVE THE EXISTENCE OF ANY DEFICIENCY.

Quite apart from the contentions already made as to the erroneous standards employed in computing compensation, there are two further reasons why the company now cannot prove the existence of any deficiency. For one thing, the present claimed deficiency arises solely out of its default. For another, the damages alleged are too speculative in their nature to warrant recovery.

1. If the company had complied with its obligation to build the main road from Wallula to Portland, no deficiency would have occurred [98]

We contended above, Point III (B), pp. 124–33, that the company's failure to complete the main line between Wallula and Portland constituted a breach of its contract so substantial in nature as to disentitle it to any further performance from the United States. Even if that contention should be rejected, so that the United States is now bound to pay compensation, the breach is still material in ascertaining the amount of that compensation. Here the decree below awards compensation in respect of about 1,453,000 acres of withdrawn indemnity lands. If the company had completed its main line, there would potentially have been 2,160,000 acres of additional lands available to satisfy mineral losses. This would have wiped out almost

[98] Assignment 40 (R. 656), *supra*, p. 47.

ail of the existing deficiency. Consequently the decree below has the effect of permitting the company to profit by its own wrong.[99]

The court below, over the objection of the United States (R. 595, Para. (d), R. 656), computed the deficiency of surveyed lands left outside the forest reserves as if the company by constructing the part of the road which it did construct had fully performed its contract. The court disregarded entirely what the effect might have been if the road had been definitely located and constructed from Wallula to Portland. If that had been done there is no probability that there would have been any deficiency, for the construction of that part of the required road would have added lands available for indemnity selection, the amount of which it is impossible to measure, but which undoubtedly would have been enough to satisfy the claims asserted by the company in this respect. The claimed loss of selection rights for which compensation is awarded was based largely on asserted mineral losses. Therefore it becomes necessary, in order fully to determine what the company's situation would be if it had completed the whole road, to know what acreage would have been available, opposite the line from Wallula to Portland, to satisfy mineral

[99] The foregoing demonstrates the bearing of the failure to complete the entire road, alleged in Subd. XIV (R. 23), on the adjustment of the land grant. The master professed himself unable to discern any relationship between the two (R. 386).

losses. By section 3 of the Act of 1864 (App. 40–42), the company, in order to satisfy mineral losses, could resort to lands in the first indemnity limits within 50 miles on either side of the road anywhere along the line, irrespective of the point where the loss occurred. Mineral losses in Montana could be satisfied from indemnity lands in Oregon.[1] Accordingly, until it is known what lands would have been available in the first indemnity limits in Oregon if the company had completed the whole railroad, no deficiency is established.

It can never be known what quantity of land would have been available in Oregon to satisfy mineral losses if the road had been built from Wallula to Portland. There might have been as much as 2,160,000 acres. Nor can it be shown on which side of the river the company would have built the road from Wallula to Portland.[2] The indefinite general maps filed in 1870 and 1872 (R. 50) show a proposal to locate the road across the

[1] The provision of the Joint Resolution of 1870 (App. 57–58), limiting second indemnity selections to the state or territory where the subsequent losses occur, did not reduce the right, previously given, to go beyond the state or territory to select from first indemnity limits.

[2] If the road had been built south of the river, it would have been in Oregon, a State; this would have given the company indemnity limits thirty miles wide out of which to satisfy mineral losses occurring within twenty-mile place limits. North of the river, the road would have been in Washington, a Territory. There mineral losses occurring within forty-mile place limits could have been satisfied only in ten-mile wide indemnity limits.

Columbia River north of Wallula (Map opposite page 8, Sen. Exec. Doc. No. 254, 50th Cong., 1st Sess.). However, the map of definite location filed October 4, 1880 (R. 52), did not cross the river at the point indicated but instead continued on the left bank to Wallula toward a line on the south side of the river. Thus it does not appear that the road to Portland would not have been constructed on the south side of the river, and therefore through Oregon. If that had been done, it is evident from the map opposite App. 2 that the area not covered by overlaps on the branch lines from Portland to Tacoma and from Pasco to Tacoma would be fully as large as the area which would be covered by the overlaps south of the railroad. In these circumstances it is conservative to disregard only the land north of the railroad and to assume that the company would have acquired the land to the south. South of the railroad there would have been a 20-mile strip of place lands and a 30-mile strip of mineral first-indemnity lands. Over the distance of 225 miles between Wallula and Portland there would be 2,160,000 acres in the alternate sections in this indemnity strip.

Any uncertainties which arise in this regard arise solely as a result of the company's breach of the condition in the grant, in failing to file a map of definite location from Wallula to Portland, and in failing to construct that part of the main road.

The company should not be permitted to require the court to guess, or even to balance the probabilities, as to whether it would have constructed the line north of the river or south of the river or, in either case, what would have been lost to settlers and others out of indemnity limits thereby established. A much more predictable probability was deemed insufficient to support the claim of the United States in *United States* v. *Northern Pacific R. R. Co.*, 193 U. S. 1, 6.

Any recovery by the company in the present case requires proof that the United States, by its own act, has cut down the lands available as indemnity to satisfy the company's losses. *Forest Reserve* case, 256 U. S. 51. Here the amount of the lands available was cut down by the company's act. Consequently there is no ground for awarding it any recovery against the United States.

2. The company is not entitled to compensation for all the lands described in the decree, having failed to show that it would or could have selected and obtained all of such lands [3].

The withdrawn lands in respect of which the decree below awarded compensation were largely unsurveyed at the time they were withdrawn. Until surveyed, as has been pointed out, they could not be selected by the company, for until survey there was no way of ascertaining whether the area

[3] Assignments 42 and 43 (R. 656–57), *supra*, pp. 47–48.

selected was equivalent to the area lost and which had been assigned as base for the selection. But so long as the lands remained public lands, they were available for acquisition by homesteaders and others, whose rights could have been initiated prior to survey. *Hewitt* v. *Schultz,* 180 U. S. 139; *Southern Pac. R. R. Co.* v. *Bell,* 183 U. S. 675; see 43 U. S. C. §§ 166, 861, 863. Thus, if the lands in question had not been withdrawn, many of them would have been obtained by others whose rights could have been initiated in competition with the company, and in a position superior to it, since these others were not required to await surveys. This subordination of the company's rights in the indemnity belts has been clear since the decision in *Hewitt* v. *Schultz,* 180 U. S. 139, and is not questioned. See the *Forest Reserve* case, 256 U. S. at 64–65, quoted at pp. 219–20, *supra.*

But the court below, by awarding compensation to the company for lands within the indemnity limits without a showing on the part of the company that it could or would have selected such lands if they had not been withdrawn, is in effect treating the withdrawn lands as if they had been withdrawn for the benefit of the company. Such a withdrawal, as *Hewitt* v. *Schultz,* 180 U. S. 139, shows, would be unauthorized and illegal. Thus the effect of the decree below is to accomplish a result which the Land Department could not have brought about by deliberate action.

The company's right of selection was not the equivalent of any particular quantity of lands. It was at best no more than a contingent power. *United States* v. *Southern Pac. R. R. Co.*, 223 U. S. 565, 570. It was subject to the inherent infirmity that it must be exercised in competition with many others. That such other persons would have taken many of the lands is obvious from the experience had with this grant from the very beginning. The area of available vacant lands was constantly being diminished by these other entries. See the *Forest Reserve* case, 256 U. S. at 64. It was the continuing influx of settlers which led to the creation of a second indemnity belt. The company repeatedly found it expedient to select in first indemnity limits, even for subsequent losses, to prevent a larger quantity from going to settlers (N. P. Exh. 138 revised, not printed).

Not only would much of the land have been acquired by persons other than the company, but in all likelihood such acquisitions would have embraced the most valuable tracts. Because the homesteaders could initiate their rights before survey, they would tend to take the choice parcels.

Not only is it certain that many of the lands, and probably the more valuable ones, would have been taken by homesteaders, but there is no proof as to which lands the company would have chosen to take, even if no competition for lands had existed.

The record of selections actually made by the company shows that large areas were allowed to stand, after survey, without any apparent effort on the part of the company to secure selection (Govt. Exhs. 95 and 96, unprinted Narrative Statement p. 212). From 1900 to 1905, for example, the company made no effort to have second indemnity limits laid down in Idaho, or to make indemnity selections there, although, throughout that time, there were never less than 37,000 acres of surveyed land there. Despite the fact that the company had 29,857.23 acres of unused subsequent losses which it could have satisfied in that belt, it selected only 280.98 acres (Govt. Exhs. 95 and 96, unprinted Narrative Statement p. 212). The reason for such inaction was undoubtedly the fact that in many cases the company did not care to pay taxes and other charges on lands which it might be required to hold for many years. The nearly six million acres still owned by the railroad in 1917, unsold, and apparently unsalable (R. 753), was a likely deterrent to such selections.

The company was not entitled to compensation for more or different lands than it would have obtained if the withdrawals had not been made. The company may have a right to be made whole, but it is not entitled to more. *Olson* v. *United States*, 292 U. S. 246, 255; *Bauman* v. *Ross*, 167 U. S. 548, 574.

Because the company's selection right "contemplates the uncertain and looks to the future," *United States* v. *Southern Pac. R. R. Co.*, 223 U. S. 565, 570, it was error for the court to disregard the great uncertainty that any particular quantity of the withdrawn lands would have been acquired and the certainty that not all for which compensation was awarded by the decree below would have been acquired. In *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, a similar contingency was held to be a bar to compensation for the taking of land subject to an easement.

Difficulties of proof are not a reason for substituting a greater recovery than the loss actually shown to have been sustained. It is not necessary to determine at this time whether the company might be able to prove the extent of its loss or damage. Certainly this record does not establish the damage, nor indeed, does it show whether any damage occurred. These facts cannot be supplied by conjecture. *Keogh* v. *Chicago & N. W. Ry. Co.*, 260 U. S. 156, 165. It was error for the court below to award any compensation in the absence of a showing that the rights claimed by the company would have been made effective by selection, and in the absence of any showing as to what lands would have been selected and obtained.

There is no inconsistency between this argument and that made in Point IV (B), *supra*, pp. 204–13.

There we urged that the uncertainty, substantial though it was, should not bar the United States from an opportunity to prove its loss. Here we are saying that the company, having been afforded an opportunity for proof, has failed to make out a case. If, given a similar opportunity, the United States should likewise fail to show damage, it would not be entitled to recovery under Point IV (B) any more than the company is entitled to compensation here.

CONCLUSION

It is submitted that the order of the district court of October 3, 1935, as amended, and the decree of the district court of June 27, 1939, should be reversed in the respects and for the reasons hereinbefore stated, and that the cause should be remanded with instructions to proceed in accordance with the opinion and mandate of this Court.

Respectfully submitted,

FRANCIS BIDDLE,
Solicitor General.

FRANCIS M. SHEA,
NORMAN M. LITTELL,
Assistant Attorneys General.

FREDERICK BERNAYS WIENER,
E. E. DAILY,
Special Assistants to the Attorney General.

WALTER S. SURREY,
MARGARET A. SHEA,
Attorneys.

SEPTEMBER 1940.

APPENDIX A

PRESIDENT COOLIDGE'S LETTER

THE WHITE HOUSE,
Washington, February 23, 1924.

MY DEAR MR. SINNOTT: I desire to bring to your attention a letter from the Secretary of Agriculture under date of February 19, 1924, in reference to the claim asserted by the Northern Pacific Railroad to large areas of valuable timberland within the national forests.

The possible loss of public title to these resources, which have been protected and developed for many years at public cost, arises under an adjudication of the land grant made by Congress to the Northern Pacific Railroad in 1864. It is my understanding that the legislation conveying this grant of 40,000,000 acres of public land was, in effect, a contract or covenant between the United States and the railroad company, under which mutual obligations were assumed. Certain features of these obligations, particularly on the part of the Government, have from time to time been reviewed and determined by the Federal courts, but their decisions were confined necessarily and purposely to the immediate issues brought before them. At no time does there appear to have been a comprehensive review or determination of the entire transaction, covering the mutual equities and obligations created by the covenant, if the

grant to the Northern Pacific Railroad may purposely be so designated.

The statements contained in the letter from the Secretary of Agriculture raise serious questions as to the extent to which the railroad company may have obtained undue benefits from the grant, and also as to the extent of its compliance with the obligations imposed upon it by the legislation which conferred the grant. I believe that these questions should be fully determined before a final settlement of the matter is effected, and before further public lands are patented to the company. From the nature of the case, and particularly the broad and varied equities which it involves, it would seem that such a determination and settlement can be made only by the Congress.

The United States has granted lavishly of its public resources to aid the extension of transportation facilities, and thereby the economic development of the Western States. No question as to the wisdom of that policy is involved in this issue. Nor is any question involved as to the legal and moral obligation of the Government to discharge in full the contractual obligations which is assumed for the accomplishment of the public benefits. That the legal and equitable claims of the grantee should be fully weighed and safeguarded goes without saying. But it is still more imperative that the interest of the public, both in the possession and conservation of valuable natural resources and in the accomplishment of the purpose from which the grant was made, be adequately protected in an equitable settlement of this question.

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The Secretary of Agriculture in a letter to me states further a summary of the facts involved in this matter, as they have been developed through a painstaking investigation. The full record of that investigation has no doubt been placed at your disposal. I quote from the letter of Secretary Wallace, dated February 19, 1924:

> In April, 1921, the Supreme Court rendered a decision (256 U. S. 51) with regard to lands in the indemnity limits of the grant to the Northern Pacific holding that lands in these limits could not be withdrawn by the United States if they were needed to satisfy the acreage of the grant.
>
> The tentative adjustment made by the Department of the Interior shows the grant to be deficient some 3,900,000 acres.
>
> Large areas of national forest lands are within the indemnity limits of the grant. It follows that should the tentative adjustment become final, a large acreage of these national forest lands will pass to the Northern Pacific.
>
> When this situation became evident this department, through the Forest Service, began a thorough investigation of the Northern Pacific grants. As a result of this investigation certain representations were made to the Department of the Interior, and on January 24, 1924, I addressed a letter to the Secretary of the Interior and asked him to join with me in sending to Congress a proposed joint resolution directing the Secretary of the Interior to withhold his approval of the adjustment of the Northern Pacific land grants until Congress shall have made a full and complete inquiry into them.
>
> The Secretary of the Interior complied with this request, and the proposed resolution was sent to Congress and was introduced in

the House by Hon. N. J. Sinnott, chairman of the Committee on Public Lands, and in the Senate by Senator Lenroot.

As this matter no doubt will come to your attention, if it has not already, I desire to give you a brief statement of the reasons for this action by this department.

The case in which the Supreme Court (256 U. S. 51) defined the measure of the Northern Pacific grants did not take into consideration, and properly so, many other questions which I believe should be considered by Congress before the case reaches the point where the Northern Pacific may take these national forest lands.

The defaults of the Northern Pacific were numerous and flagrant, and the supplementary benefits allowed by the Government were many and lavish, but in the absence of action by Congress the courts and the administrative departments were and are without authority to consider the resulting equities, but have been forced to act as though the company had complied with every term of the grant, both in spirit and letter. Congress, as the contracting power in this case, has the power and authority to determine what weight shall be given to such violations of the grant and such beneficial concessions. It alone can inquire into the grants for the purpose of ascertaining whether they have been fairly satisfied to date by the United States, taking into consideration the equitable and other features of the grants that were not before the Supreme Court when it handed down its decision (256 U. S. 51).

I submit that if the proof is sufficient to show that the Northern Pacific failed to meet the requirements of its agreement, or that

the Northern Pacific has already received a greater acreage or greater values than it was equitably entitled to receive, Congress has ample authority to save these national forest lands to the Government. I believe an investigation by Congress would show:

1. That the land grants were made for the purpose of aiding in the construction of the railroad. The total gross receipts of the Northern Pacific to June 30, 1917, from the sale of the lands from its grant amounted to $136,118,533.14. The cost of constructing the road did not exceed $70,000,000. The sale of lands has more than paid for the cost of constructing the railroad.

2. That the Northern Pacific failed to construct 1,507.21 miles of its railroad within the time required by law, thereby rendering the granted lands subject to forfeiture.

3. That the Northern Pacific failed to dispose of certain of its lands to settlers at not to exceed $2.50 per acre as required by the law. A somewhat similar provision in the Oregon and California grant was held by the Supreme Court to be an enforceable covenant (238 U. S. 393).

4. That the Northern Pacific failed to dispose of hundreds of thousands of acres of its lands at public sale, as required by law.

5. That hundreds of thousands of acres of poor land in the Northern Pacific grant were erroneously classified as mineral. This land was turned back to the United States and the railroad acquired mineral indemnity rights therefor, which were applied in part on more valuable lands in the indemnity limits.

6. That under a rule of law laid down by the Supreme Court the Northern Pacific has been erroneously allowed 1,500,000 acres too much land in the State of Washington.

7. That over 500,000 acres of land credited to the Northern Pacific should be deducted because of conflict with the land grant of another road and the erroneous fixation of the land-grant limit lines.

8. That approximately 640,000 acres of land have been erroneously allowed the Northern Pacific by reason of the Tacoma overlap.

9. That the Northern Pacific has received approximately 600,000 acres of land to which they were not entitled under their grant in the Wallula overlap.

10. That the Northern Pacific has been allowed to make over 1,300,000 acres of indemnity selections in its second indemnity belt, whereas these selections should have been confined to the first indemnity belt.

11. That for lands erroneously patented to the Northern Pacific the Government should be entitled to receive at least what the railroad received from the sale of these lands instead of $1.25 per acre.

12. That the Northern Pacific, under the Mount Rainier Park act of March 2, 1899, relinquished to the United States thousands of acres of commercially valueless land and received therefor selection privileges applicable to the finest lands they could find in the States of Oregon, Washington, Idaho, Montana, North Dakota, Minnesota, and Wisconsin.

I am sending with this letter a mimeographed pamphlet, which is in the nature of a brief, dealing with the whole matter. This brief was filed by the Forest Service of this department with the General Land Office on July 12, 1923.

The resolution which has been introduced in Congress does not attempt to take any

land from the Northern Pacific. It merely holds the adjustment of the grant and the issuance of further patents in abeyance until Congress has had an opportunity to make an inquiry into the land grants so that it may pass such legislation as it may deem right and proper.

It is my opinion that the case is beyond question one for the action of Congress. It would be extremely unfortunate if 3,000,000 acres of national forest lands should be lost to the United States, if Congress has the authority to save them under legislation, which in the light of all the law and the facts would be fair and just to the Northern Pacific Railway Co.

For the reasons set forth by the Secretary of Agriculture, I heartily concur in his recommendation that the entire matter should receive the attention of Congress. I therefore urge upon your committee the importance of action as early as possible which shall look to the fullest protection of the public interest herewith concerned. The recital of the facts has deeply interested me, and it is this interest, together with the conviction that a highly important public interest can only be effectively protected by appropriate congressional action, that prompts me to write you.

Most sincerely yours,

CALVIN COOLIDGE.

Hon. NICHOLAS J. SINNOTT,
Chairman, Committee on the Public Lands,
House of Representatives.

APPENDIX B

COMMITTEE REPORT ON THE ACT OF JUNE 25, 1929

71ST CONGRESS, 1ST SESSION | SENATE | REPORT No. 5

NORTHERN PACIFIC LAND GRANTS

APRIL 29, 1929.—Ordered to be printed

Mr. KENDRICK, from the joint congressional committee appointed to investigate Northern Pacific land grants, submitted the following

REPORT

(To accompany S. 669)

The joint congressional committee appointed to investigate Northern Pacific land grants submitted the following report to accompany the bill (S. 669), to alter and amend an act entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific coast, by the northern route," approved July 2, 1864, and to alter and amend a joint resolution entitled "Joint resolution authorizing the Northern Pacific Railroad Co. to issue its bonds

for the construction of its road and to secure the same by mortgage, and for other purposes," approved May 31, 1870; to declare forfeited to the United States certain claimed rights asserted by the Northern Pacific Railroad Co., or the Northern Pacific Railway Co., to direct the institution and prosecution of proceedings looking to the adjustment of the grant, and for other purposes, with the recommendation that it do pass without amendment.

On February 23, 1924, the Hon. Calvin Coolidge, President of the United States, called the attention of the chairman of the Public Lands Committee of the House of Representatives to the fact that the Northern Pacific Railway Co. was asserting claims to large areas of valuable timberland within the national forests to satisfy a claimed deficiency in the land grant made by the act of July 2, 1864 (13 Stat. 365), and the joint resolution of May 31, 1870 (16 Stat. 378); that the loss of public title to resources which had been protected and developed for many years at public cost was threatened, and that the grants had not been fully adjusted. The President advised that certain statements contained in a letter from the Secretary of Agriculture raised serious questions as to the extent to which the railroad company may have obtained undue benefits from the grant and also as to the extent of its compliance with the obligations imposed upon it by the legislation which conferred the grants. He further stated that he believed these questions should be fully determined before a final settlement of the matter is effected and before further public lands were patented to the company,

and recommended that the entire matter receive the attention of Congress, and that such action be taken as would look to the fullest protection of the public interests concerned.

After preliminary hearings, held by the Public Lands Committee of the House, Congress adopted the resolution approved June 5, 1924 (43 Stat. 461), by virtue of which your committee was appointed. This committee was "empowered and directed to make a thorough and complete investigation of the land grants of the Northern Pacific Railroad Co. and its successor, the Northern Pacific Railway Co., under the act of July 2, 1864 (13 Stat. 365), and the joint resolution of May 31, 1870 (16 Stat. 378), and any further acts of Congress supplemental thereto or connected therewith, and the facts and the law pertaining thereto and arising therefrom, and to report to Congress its conclusions and recommendations based thereon." By joint resolution approved May 28, 1928, this committee was given leave to report at any time, by bill or otherwise.

Extensive hearings have been had, at which representatives of the Department of Agriculture, the Department of the Interior, and the Northern Pacific Railway Co. were present. The privilege of calling and examining witnesses and being heard in argument was extended to all interested persons. A number of witnesses have been called and examined and legal representatives of the governmental departments and of the company have been heard on the propositions of law and facts involved. Your committee has made a detailed study of all the circumstances and facts connected with the

points raised in this controversy and the law applicable thereto. Ninety-four days of hearings have been held and proceedings covering over 5,500 pages have been printed.

The record shows that by the act of July 2, 1864, and the resolution of May 31, 1870, a vast area of the public domain was granted to the Northern Pacific Railroad Co. to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound; that the grants contain certain terms, conditions, and covenants imposing certain obligations upon the United States and upon the company; that these obligations have not been fully complied with by the company; that the company has already received upward of 35,000,000 acres of land under the grants concerning part of which controversies have arisen; that questions of fact and of law have arisen from time to time in the administration of the grants; that the Northern Pacific Railway Co. now claims that a large deficiency in the grants still exists, and further claims the right to satisfy the deficiency by the selection of lands within national forests and other Government reservations within the indemnity limits of the grants; that large sums of public money have been expended during the past 25 years on the lands within these national forests and other Government reservations which lands the company claims the right to select; that the public interests require that these lands be retained by the United States; that it is desirable that a speedy and final adjustment of the grants be had; that the decision of the courts be obtained on the controverted questions of law and fact, and that the respective rights

of the United States and the Northern Pacific Railroad Co. and/or its successor, the Northern Pacific Railway Co., be fully and finally established.

We are presenting with this report a bill under which it is contemplated that proper proceedings shall be instituted by the Attorney General of the United States to procure a final and complete determination of the respective rights of the United States and the Northern Pacific Railway Co. to the end that the grants shall be finally adjusted and the interests of the United States and the grantee shall be fully protected. We are convinced that such legislation is necessary to protect the interests of the United States and to determine the issues involved.

The provisions of the bill may be summarized, in general, as follows:

By the first section all lands, surveyed or unsurveyed, within the indemnity limits of the grants and within the exterior boundaries of national forest and other Government reservations are removed from the operation of the land grants and retained by the United States as part of the reservations within which they are situate, relieved and freed from all claims, if any exist, which the Northern Pacific Railroad Co. or its successor, the Northern Pacific Railway Co., may have to acquire them as indemnity selections or otherwise, and provision is made that the railroad company or its successor shall be entitled to be compensated to the extent and in the amounts, if any, the courts hold compensation is due.

By section 2, all unsatisfied indemnity selection rights, if any exist, claimed by the company, or its

successor, together with all claims to additional lands by virtue of the grants are declared forfeited. (The committee having considered all the facts and circumstances believes that this limited forfeiture is justified.)

Section 3 retains for the United States the right to enact additional legislation on the subject.

Section 4 provides that the act shall not be construed as affecting the present title of the company or its successors in the right of way, acquired under the grants, or lands actually used in good faith by the Northern Pacific Railway Co. in the operation of its road, such as lands used for depots, station buildings, work shops, machine shops, switches, side tracks, and water stations.

Section 5 directs the Attorney General to institute proceedings to accomplish the objects mentioned therein and in the act in its entirety.

Section 6 requires that an accounting be had and authorizes the rendering of such judgments and decrees as law and equity may require.

Section 7 relates to the fixing of jurisdiction and to matters of procedure.

Section 8 makes it the duty of the Attorney General to report to Congress any final determination rendered in the proceedings and requires the Attorney General, the Secretary of the Interior, and the Secretary of Agriculture to submit to Congress such recommendations for the enactment of legislation, if any, as they deem desirable in the interests of the United States in connection with the execution of said judgments and decrees, or otherwise.

By section 9 the Secretary of the Interior is directed to withhold his approval of the adjustment

of the grants and related acts, and to withhold the issuance of further patents or muniments of title under the grants, and under acts supplemental thereto until the proceedings contemplated by this act have been finally determined, provided that the act shall not prevent the adjudication of any claims arising under the public land laws where the claimants are not seeking title thereto under the grants to the Northern Pacific Railroad Co. or its successor, or under any acts in modification thereof or supplemental thereto.

Your committee, in making the foregoing summary of the purposes of the various sections of the bill, does not intend that the summary shall be taken as limiting or restricting their meaning as more fully set out and reflected in the bill itself.

Your committee reported to the Seventieth Congress, second session, a similar bill which, on February 21, 1929, was submitted to the Senate by Mr. Kendrick and to the Hou[illegible] by Mr. Colton. The remarks of Mr. Colton made in the House in connection with the bill on March 2, 1929, which appear in the Congressional Record of March 12 (pp. 5294–5298) and March 15, 1929 (pp. 5431–5433);[1] are, by reference, hereby incorporated in and made a part of this report.

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[1] These references are to the temporary paging of the daily Congressional Record. The material referred to appears in the permanent Record at 70 Cong. Rec. 5118–22. There are two references to the temporary paging, for the reason that the March 12 issue contained a copy of H. R. 17212, 70th Cong., 2d Sess., as it passed the House, and not as it was reported to the Joint Committee. The March 15

The committee unanimously recommends that the bill be passed.

Respectfully submitted.

DON B. COLTON, *Chairman.*	HENRY F. ASHURST.
WESLEY L. JONES.	JOS. L. HOOPER.
PETER NORBECK.	F. D. LETTS.
FREDERIC M. SACKETT.	WM. J. DRIVER.
JOHN B. KENDRICK.	SAM B. HILL.

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issue contains the bill as reported, with the preambles included. The correction thus made was incorporated into the permanent Record.

APPENDIX C

STATEMENT OF MR. COLTON IN THE 70TH CONGRESS, INCORPORATED BY REFEPENCE IN THE COMMITTEE REPORT

[House of Representatives, March 2, 1929; 70 Cong. Rec. 5118-22]

Mr. COLTON. Mr. Speaker, by the act of July 2, 1864, and the joint resolution of May 31, 1870, Congress granted certain public lands to the Northern Pacific Railroad Co. to aid in the construction of a railroad from Lake Superior to Puget Sound.

On February 27, 1929, the House passed H. R. 17212, to amend the act of July 2, 1864, and the resolution of May 31, 1870, to declare forfeited to the United States certain claimed rights asserted by the Northern Pacific Co., or its successor, the Northern Pacific Railway Co., and to direct the institution and prosecution of proceedings looking to the adjustment of the Northern Pacific land grants, and for other purposes.

I should like to incorporate in the Record a copy of H. R. 17212 as it was reported to the House and a copy of House Report No. 2628 that was prepared to accompany the bill. The bill and the report were prepared by the joint committee of Congress appointed to investigate the Northern Pacific land grants under the resolution June 5, 1924.

H. R. 17212, as it was reported to the House is as follows:

[The bill is printed here in full]

House report No. 2628 is as follows:

[The report is printed here in full]

The Congressional investigation of the Northern Pacific land grants had its inception in the right asserted by the Northern Pacific Railway Co., the successor of the Northern Pacific Railroad Co., to select or otherwise acquire certain national-forest lands in satisfaction of the land grants.

In 1904 certain lands within the indemnity limits of the Northern Pacific land grants were withdrawn by the United States for national-forest purposes under the then prevailing construction of the law that such withdrawals were valid as against the grantee railroad company and its successor. The Northern Pacific Railway Co. contended that the Government could not make these withdrawals in the face of an unsatisfied deficiency in the acreage of the land grants. In litigation that grew out of the controversy the Supreme Court held (256 U. S. 51) that the Government could not make the withdrawals if the withdrawn lands were needed to make up the acreage the railroad company was entitled to receive under the granting acts. The Supreme Court held, however, that the figures before it were inadequate for the purpose of determining whether a shortage existed in the land grants and, in effect, returned the case to the Interior Department for a recount of the acreage.

At this point the Forest Service of the Agriculture Department entered the case, suggesting that if proper deductions were made a deficiency would not be found to exist in the acreage of the grants. The Forest Service suggested that the Northern Pacific Railroad Co. had failed to comply with certain of its obligations under the granting acts and that through collusive land sales, erroneous construction of the law, and otherwise the grantee

railroad company and its successor had received acres and values in excess of what they were entitled to under the land grants. The Forest Service also suggested that the land grants were subject to forfeiture.

Following a consideration of the matters presented by the Forest Service, the Secretary of the Interior held that the previous tentative adjustment figures were 1,200,000 too high in favor of the Northern Pacific, left certain other questions open for further consideration, and stated that Congress alone was authorized to act upon certain other questions presented to him by the Forest Service.

By joint letter of February 12, 1924, addressed to the Hon. N. J. Sinnott, chairman of the Public Lands Committee of the House, Secretaries Wallace and Work recommended a congressional investigation of the Northern Pacific land grants. President Coolidge, by letter of February 23, 1924, made a similar recommendation to Mr. Sinnott.

Following preliminary hearings held before the House Committee on the Public Lands and the Senate Committee on Public Lands and Surveys, Congress passed the joint resolution of June 5, 1924, providing for an investigation of the Northern Pacific land grants by a joint committee of Congress, the committee to be made up of five members of the Senate and five members of the House.

Your committee appointed under the resolution June 5, 1924, of which I have the honor to be the chairman, has held hearings in this matter, which is an involved and important one. The record as it now appears consists of over 5,500 printed pages.

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The testimony taken at the hearings shows that the Northern Pacific Railroad Co., or its successor, the Northern Pacific Railway Co., has not made a full compliance with the obligations, expressed and implied, that were contained in the act of July 2, 1864, and the resolution of May 31, 1870.

Your committee is of the opinion that the grantee railroad company and its successor are not now entitled to the same compensation from the United States they would have been entitled to receive had they made a full and complete compliance with the obligations that were contained in the act of July 2, 1864, and the resolution of May 31, 1870, and which the grantee railroad company obligated itself to perform.

Likewise, your committee is of the opinion that the grantee railroad company or its successor should not now be permitted to profit under the land grants at the expense of the United States through transactions that were collusive, fraudulent, or otherwise illegal. The testimony taken at the hearings shows that there were such transactions. Your committee is of the opinion that the grantee railroad company or its successor is not entitled to any further lands from the United States.

It was, therefore, the unanimous opinion of your committee that the enactment of H. R. 17212 is necessary for the proper protection of the interests of the United States. The bill if enacted will permit the United States to go into the courts on a comprehensive basis and at the same time it will afford the grantee railroad company or its successor an opportunity to be fully heard in support of such contentions as it may desire to make in

opposition to any position taken by the United States in the court proceedings.

Under the first section of H. R. 17212 the United States retains title to the lands within the national forests and other Government reservations that might be subject to acquisition by the Northern Pacific Railway Co., in the event it should be found that there is an unsatisfied deficiency in the acreage of the grants. The section removes these lands from the operation of the grants and provides that the railroad company shall be entitled to compensation in the event the courts find that compensation is due from the United States. This action is taken under the power reserved by Congress to repeal, alter, or amend the grants. As yet an unsatisfied deficiency has not been found to exist in the land grants. Should it be found that there is no deficiency in the acreage of the grants, these reserved lands may be held by the United States without making compensation therefor. The national forest lands are integral parts of the reservations in which they are located, and public policy requires that title to these lands be retained by the United States, even though payment has to be made for them.

Section 2 declares a forfeiture by the United States of the unsatisfied indemnity selection rights, if any exist, which are held by the grantee, Northern Pacific Railroad Co., or its successor, the Northern Pacific Railway Co. The forfeiture does not affect any land to which title has passed from the United States. The extent of the forfeiture of the unsatisfied indemnity rights is necessarily dependent upon what the courts hold the grantee railroad company or its successor is entitled to receive

under the granting acts. Since the decision of the Supreme Court in two hundred and fifty-six United States, 51, the Secretary of the Interior has held that the Northern Pacific Railway Co. has been credited with approximately 1,200,000 acres over and above what it is entitled to receive. This deduction and the acreage covered by several other major points, as yet not finally decided, will be directly reflected in the amount of the forfeiture covered by this section.

Under the act of July 2, 1864, as amended, the Northern Pacific Railroad Co. was required to complete its railroad by July 4, 1879. This date has never been extended by Congress. A special provision covering the construction of the railroad between Portland, Oreg., and the western terminus of the road (later fixed at Tacoma) was contained in the resolution of May 31, 1870. Of the Northern Pacific Railroad covered by the act of July 4, 1864, and the resolution of May 31, 1870, approximately 530 miles were constructed within the time limits prescribed by Congress, 1,507 miles were constructed out of time and in violation of the provisions of the congressional enactment, and approximately 215 miles of the main-line railroad—the section between Wallula, Wash., and Portland, Oreg.—have never been constructed. The minimum requirement that not less than 100 miles of railroad be completed each year, as required by the act of July 1, 1868, was violated by the grantee company in that there was a cessation of railroad construction from approximately 1874 to 1879.

The requirement that the railroad be completed within the time limit prescribed by Congress was a condition subsequent. The failure of the grantee

railroad company to complete the railroad within the time limit prescribed constituted a breach of this condition subsequent and rendered the grant subject to forfeiture by Congress. This feature of the case was dealt with at length in the proceedings before your committee, by counsel for the Government and for the Northern Pacific Railway Co., the contention being made for the railway company that any right the United States may have had to declare a forfeiture had been waived.

In the Oregon and California land-grant case (238 U. S. 393) the question of waiver was raised, but the Supreme Court rejected the contention of the railroad, stating:

> We may observe again that the acts of Congress are laws as well as grants and have the constancy of laws as well as their command and are operative and obligatory until repealed. This comment applies to and answers all the other contentions of the railroad company based on waiver, acquiescence, and estoppel, and even to the defenses of laches and the statute of limitations. The laws which are urged as giving such defenses and as taking away or modifying the remedies under review have no application. It would extend this opinion too much to enter upon their discussion.

The Supreme Court again considered the Oregon and California land-grant case. In referring (243 U. S. 549) to the earlier decision in Two hundred and thirty-eighth United States and the land grants, the court said:

> And we gave emphasis to them as laws and the necessity of obedience to them as such, the remission of their obligation to be

obtained "through appeal to Congress" and not by an evasion of them or a defiance of them.

Your committee having in mind that the granting acts to the Northern Pacific Railroad Co. were laws as well as grants were unanimously of the opinion that Congress now has the right to declare the forfeiture provided by section 2 of H. R. 17212 and that such a forfeiture, by reason of the facts as disclosed at the hearings, should be declared. In this connection it should be borne in mind that any forfeiture declared by Congress is subject to review in the courts if the grantee railroad company or its successor desires to contest the forfeiture.

In arriving at the conclusion that the forfeiture should be declared, your committee was influenced by, among other things: (a) the failure of the grantee company to construct the railroad within the time specified and otherwise, as required by the granting acts; (b) the fraudulent and illegal mineral classifications under the act of February 26, 1895; (c) the collusive sales of the granted lands in violation of and in evasion of the provisions of the resolution of May 31, 1870, in connection with the foreclosure of the mortgages coincident with the 1875 and the 1896 reorganizations of the Northern Pacific Railroad Co.

The United States was not a party to any of these proceedings. (d) The failure of the Northern Pacific Railroad Co. to dispose of any of the granted lands through settlement and preemption after July 4, 1884, as required by the resolution of May 31, 1870; (e) the benefits obtained by the Northern Pacific Railroad Co. through the illegal withdrawals on general route and through the

illegal withdrawals of indemnity lands; (f) the disposition of the capital stock of the Northern Pacific Railroad Co. under the original interests agreements in violation of section 10 of the act of July 2, 1864; (g) the issuance of the capital stock before and after the 1875 reorganization, without compensation being made therefor; (h) the illegal disposition of granted lands for preferred stock and the illegal cancellation of the preferred stock; (i) the laches of the Northern Pacific Railroad Co. in making indemnity selections while lands were available; (k) the affiliated land and construction companies; (l) the additional values received by the grantee or its successor under supplemental acts of Congress. These propositions were given weight, singly and collectively, by your committee in arriving at the conclusion that the forfeiture covered by section 2 of H. R. 17212 be declared.

Section 3 provides that the right to alter or amend the act of July 2, 1864, and the resolution of May 31, 1870, is not to be considered as fully exercised, waived, or destroyed by the act or evidencing on the part of Congress to depart from the policy expressed in the resolution of May 31, 1870, relative to the disposition of the granted lands.

Section 4 protects in the railway company its right-of-way or lands used in good faith in the operation of the railroad.

Section 5 directs the Attorney General to institute suit to accomplish the objects mentioned therein and in the act in its entirety.

Section 6 requires that an accounting be had and authorizes the rendering of such judgments and decrees as equity may require.

Section 7 relates to the fixing of jurisdiction and to matters of procedure.

Section 8 makes it the duty of the Attorney General to report to Congress any final determinations in the proceedings and requires the Attorney General, the Secretary of the Interior, and the Secretary of Agriculture to submit to Congress such recommendations for the enactment of legislation they may deem desirable in the interests of the United States in connection with judgments, decrees, or otherwise.

Section 9 suspends the adjustment of the grants and withholds the issuance of patents until the suit or suits contemplated by the act have been finally determined.

In concluding these remarks in connection with H. R. 17212, I desire to point out that shortly after the conclusion of the taking of testimony by your committee an analysis was made of the record of the hearings by the Department of Justice. On February 8, 1928, a memorandum was transmitted to your committee by the Attorney General. This memorandum states that grantee railroad company and its successor have received under the grants many thousands of acres of land that they have not earned and are not entitled to, besides additional value. The memorandum holds that the right of forfeiture exists in the United States.

I may say for anyone who has not had an opportunity to familiarize himself with the case by reading the entire record that a résumé may be found in parts 9 to 14, inclusive, wherein the briefs and digest are printed.

APPENDIX D

SUMMARY OF ACTS PLEADED BY THE COMPANY AS CONSTITUTING WAIVER, ACQUIESCENCE, OR ESTOPPEL ON THE PART OF THE UNITED STATES

In its answer (R. 156–63) the company pleaded 34 Acts of Congress by which, it is contended, the United States has, among other things, "accepted the railroad and telegraph line built by the Northern Pacific Railroad Company as a compliance with the terms of the Act of July 2, 1864." The other matters as to which waiver and estoppel were pleaded are no longer involved in the present appeal, and will not be considered here. Thus, we do not dispute (1) that the Northern Pacific Railroad Company named as a defendant in this case is the federal corporation, created by the Act of July 2, 1864, or that (2) the Northern Pacific Railway Company is successor in interest to the Northern Pacific Railroad Company, or that (3) burdens were imposed on the Northern Pacific Railroad Company as the company created by the Act of July 2, 1864. We are concerned here only with the contention that the United States has accepted the railroad and telegraph line built by the Northern Pacific Railroad Company as a full compliance with the Act of July 2, 1864, and Joint Resolution of May 31, 1870.

An examination of the acts will show, not only that they do not constitute an acceptance of the road, but also that they do not amount to acquies-

cence or waiver, and that they do not estop the United States from urging any of the company's defaults as reasons for denying it any further performance on the part of the United States.

It follows from the principles discussed in the text, *supra*, pp. 85–91, first, that none of the Acts of Congress pleaded by the company can constitute acquiescence or waiver in the absence of a showing by the company that Congress had knowledge of the company's defaults and an understanding of the rights of the United States growing out of them; and, second, that no act of Congress can constitute an estoppel unless it be shown that the company changed its position to its disadvantage as a result of such act. There is no showing that Congress knew prior to the Joint Committee hearings of any of the defaults of the company complained of herein, except possibly the failure of the company to complete the road between Wallula and Portland. As to this default it probably can be inferred that Congress knew after the Forfeiture Act of September 29, 1890, that there would be no land grant for construction between Wallula and Portland and that, therefore, in all probability no road would be built there.

Furthermore, there is no showing that the company conducted itself to its disadvantage after it completed the construction of the road as constructed. The main line, as constructed, was completed in 1883 and the branch line in 1887. Obviously, no Act of Congress passed after these dates operated to induce the company to conduct itself to its disadvantage. There was no change of position on the part of the company after it became known that the Wallula-Portland line would

probably not be built. We submit that an analysis of the pleaded acts will show not only that Congress did not intend to relinquish any rights arising in favor of the United States by reason of the company's defaults, but that, on the contrary, Congress took great pains to avoid doing just that thing. Its expressed purpose was to avoid relinquishing any rights.

The acts are as follows:

1. *Act of July 15, 1870, c. CCXCII, 16 Stat. 291, 305 (App. 60).*—This Act made an appropriation to survey the public lands within the limits of the Northern Pacific grant and provided that before any land granted to the company should be conveyed, there should first be paid into the Treasury of the United States by the company or party in interest the cost of surveying and selecting the same. The validity of this Act was upheld in *Northern Pac. R. R. Co.* v. *Traill County,* 115 U. S. 600. It was passed before any of the road was constructed and obviously can not constitute an acceptance of the road as a compliance with the terms of the granting Act and Resolution, or constitute a waiver of any breach.

2. *Act of July 10, 1882, c. 284, 22 Stat. 157 (App. 61).*—This Act ratified an agreement with the Crow Indians for the relinquishment by these Indians of a strip of land through their reservation needed for the right of way, and certain tracts intended for use for station houses, depots, switches, etc., and for the payment therefor of $25,000 to the credit of the Indians. The Act granted this land to the Company on condition precedent that it pay this sum to the United States.

The Act contained nothing which suggests that the Company was to be excused from completing the whole road, and nothing which waives any breaches except, possibly, completion of that part of the road out of time. Just previous to the passage of this Act, five bills in Congress for the extension of time for the completion of the road after 1879 had failed of passage (Govt. Exs. 50, 51, 52, 53, and 54), and bills were then pending before Congress to forfeit the grant for noncompletion of the road within the time limit. The company was therefore charged with notice, at the time this Act was passed, that the grant might be forfeited.

3. *Act of July 4, 1884, c. 180, 23 Stat. 76, 89 (App. 69.)*—This Act was an appropriation act for expenses of the Indian Department. It was passed after the road had been constructed and was in operation through the Flathead Reservation, and its purpose was to pay the Indians for lands which had already been taken from them. It contained this very significant proviso:—"*Provided,* That nothing herein shall be construed as in any wise affecting the relation between the Government and said Railroad Company growing out of the grant of land made to said company beyond the right of way provided for in said agreement." Yet this is one of the Acts relied upon by the company to show acquiescence, waiver, and estoppel.

Between the date of this Act and the date of the next one pleaded by the company, Congress passed two laws of very great significance, the Act of July 10, 1886, c. 764, 24 Stat. 143 and the Act of March 3, 1887, c. 376, 24 Stat. 556 (App. 70). By the Act of 1886 Congress provided that no lands granted to any railroad corporation by Congress should be

exempt from taxation on account of the lien of the United States for the cost of surveying. The act provided (Section 3) "That this Act shall not affect the right of the Government to declare or enforce a forfeiture of any lands so granted; but all the rights of the United States to said lands or to any interest therein shall be and remain as if this act had not been passed, except as to the lien mentioned in the first section hereof."

The Act of 1887 provides for the adjustment by the Secretary of the Interior of the land grants to each of the land-aided railroads. Section 4 thereof contained the following proviso: "* * * nor shall this act be construed as a declaration of forfeiture of any portion of any land grant for conditions broken, or as authorizing an entry for the same, or as a waiver of any rights that the United States may have on account of any breach of said conditions."

This Act of March 3, 1887, known as the General Adjustment Act, must be read as *in pari materia* with the others under consideration. It was the guiding act from March 3, 1887 to June 5, 1924 in administering the Northern Pacific grant. Some of the later Acts were passed in order to carry into effect the adjustments for which it provided. In the clearest terms it provides that Congress did not waive any breach of condition and that it did not authorize the Secretary of the Interior to do so. Consequently nothing done thereunder could be a waiver of the defenses which the United States now asserts.

4. *Act of October 19, 1888, c. 1210, 25 Stat. 565, 567 (App. 75).*—This Act appropriates $18.63 to pay the Northern Pacific Railway Company for

transportation of public property during March and April, 1887. The Act has no significance on any issue in the case. Moreover, this Act and all subsequent acts were passed after all construction had ceased. The company can show no reliance on such Acts to its injury.

5. *Act of March 1, 1889, c. 326, 25 Stat. 771 (App. 76)*.—This act authorized an exchange of lands between settlers and the Northern Pacific Railroad Company to correct an error due to mistake in a preliminary survey. Section 3 provides: "That nothing contained in this act shall be taken or construed as waiving, releasing, or in anywise affecting any right of the United States to forfeit any lands granted to the Northern Pacific Railroad Company by act of Congress to aid in the construction of its line of railroad, by reason of the breach of the conditions of any such grant; and any rights to any lands acquired by the Northern Pacific Railroad Company under the provisions of this act shall be taken and held subject to whatever conditions and right of forfeiture now attach to the lands which the Northern Pacific Railroad Company may give in exchange under the provisions of this act." This is another one of the Acts relied on by the company to support its claim of estoppel, acquiescence, and waiver by the United States.

6. *Act of September 29, 1890, c. 1040, 26 Stat. 496 (App. 78)*.—This was the General Forfeiture Act. By Section 1 it "forfeited * * * all lands heretofore granted to any State or to any corporation to aid in the construction of a railroad opposite to and coterminous with the portion of any such railroad not now completed, and in operation, for the construction or benefit of which such lands

were granted; and all such lands are declared to be a part of the public domain; *Provided*, That this act shall not be construed as forfeiting the right-of-way or station grounds of any railroad company heretofore granted."

This act did not relate to unselected indemnity lands. It related to place lands opposite the definite locations necessary to the vesting of any title in the railroads. Its description in the company's answer (R. 157) invites the inference that it was in terms an act dealing with the unconstructed road between Wallula and Portland. It was not such an act. It contained no suggestion of a waiver of the condition of the completion of the whole railroad. As no map of definite location of this portion of the railroad was ever filed, no title to any land had ever vested. There were no lands to forfeit. *United States* v. *Northern Pacific R. R. Co.*, 193 U. S. 1, 6. The company's opportunity to earn a grant for the Wallula-Portland portion was terminated as in the case of other railroads, but no lands were forfeited.

7. *Act of October 1, 1890, c. 1258, 26 Stat. 647 (App. 87).*—This act permitted persons who had, during a specified period, settled on lands in the second indemnity belt of the company's grant, to transfer their entries to other Government lands. Its title shows that its purpose was the relief of settlers. It has no bearing on this case.

8. *Act of February 20, 1893, c. 145, 27 Stat. 468 (App. 90).*—This act ratified an agreement between the Puyallup Indians and the Northern Pacific Railroad Company for a right of way for the Cascade branch through the Indian reservation and granted to the Northern Pacific Railroad Com-

pany a right of way through this reservation for a spur a quarter of a mile long from its Cascade branch already constructed. This act did not induce any action on the part of the company to its disadvantage. It merely required the company to pay the Indians what it owed them for lands it had already taken.

9. *Act of March 3, 1893, c. 209, 27 Stat. 612, 631 (App. 93).*—This was an appropriation act ratifying an agreement between the United States and the Yakima Indians with a proviso:—"That the Northern Pacific Railroad Company, its successors or assigns shall, within sixty days from the taking effect of this act, pay to the Treasurer of the United States the sum of eight thousand, two hundred and ninety-five dollars and eighty cents for the use and benefit of said Yakima and other confederated tribes and bands of Indians residing on the Yakima Reservation, in the State of Washington." It waived nothing and acquiesced in nothing; it has no bearing on this case.

10. *Act of February 26, 1895, c. 131, 28 Stat. 683 (App. 95).*—This is the Mineral Classification Act, considered at length at the prior argument. Insofar as it has any bearing on the present subject, it supports rather than contradicts the contentions for the United States. Section 7 contained the following proviso:

> *Provided,* That nothing contained in this Act shall be taken or construed as recognizing or confirming any grant of land or the right to any land in the said Northern Pacific Railroad Company, or as waiving or in any wise affecting any right on the part of the United States against the said North-

ern Pacific Railroad Company to claim a forfeiture of any land grant heretofore made to said company.

Many of the later Acts pleaded by the company are appropriation acts designed to implement the provisions of this Act. They are therefore *in pari materia* with it, and in effect reiterate the purpose of Congress of avoiding any waiver of the rights of the United States.

11. *Act of February 26, 1896, c. 33, 29 Stat. 17, 22 (App. 102).*—This Act appropriates money to compensate mineral classification commissioners. Except as just stated, it has no bearing on this case.

12. *Act of June 3, 1896, c. 316, 29 Stat. 245 (App. 103).*—This Act is similar to No. 7 above.

13. *Act of June 11, 1896, c. 420, 29 Stat. 413, 436 (App. 105).*—This Act is similar to No. 11 above.

Before dealing with the next Act it is to be noted that the large Forest Reserve withdrawals began in March 1898. No Act of Congress thereafter could possibly be construed as a waiver of breaches of covenants and conditions by the Company, or as an acquiescence therein so far as the lands going into the Forest Reserves were concerned. As to those indemnity lands, the United States has steadfastly adhered to the position that the withdrawals were and are valid, and that the company has no rights in the lands so withdrawn. As to place lands and lands theretofore patented, the subsequent Acts of Congress were required to meet the conditions which actually existed. None of the subsequent acts was inconsistent with the contention of the United States that the company had no right to any of the indemnity lands in controversy here.

14. *Act of July 1, 1898, c. 546, 30 Stat. 597, 620, 621 (App. 109).*—This Act, which makes a general appropriation for sundry civil expenses, provided that where lands within the granted or indemnity limits of the land grant to the Northern Pacific Railroad Company were claimed by the company and also by settlers claiming in good faith, the company might relinquish them and select in lieu thereof an equal quantity of other public lands situated within any State or Territory into which its grant extended. The Act contained a proviso to the effect—

> That nothing herein contained shall be construed as intended or having the effect to recognize the Northern Pacific Railway Company as the lawful successor of the Northern Pacific Railroad Company in the ownership of the lands granted by the United States to the Northern Pacific Railroad Company, * * * and nothing in this Act shall be construed as enlarging the quantity of land which the said Northern Pacific Railroad Company is entitled to under laws heretofore enacted.

This Act was passed in the interest of settlers; it expressly negatives any acquiescence or waiver.

15. *Act of March 2, 1899, c. 377, 30 Stat. 993 (App. 113).*—This Act sets apart lands for Mount Rainier National Park. The only section of any possible significance, section 3, quoted in the Company's answer (R. 159), permits the Company on conveying to the United States the lands in this reservation and in the Pacific Forest Reserve, which have heretofore been granted to it, to select an equal quantity of nonmineral public lands "lying within any State into or through which the

railroad of said Northern Pacific Railroad Company runs." This Act waived nothing and acquiesced in nothing. Under the allegations of Subdivision XXXV of the bill (R. 75) this Act operated greatly to the advantage to the Company.

16. *Act of March 2, 1901, c. 807, 31 Stat. 950, (App. 118).*—Under the title of "An Act for the relief of settlers under the public land laws to lands within the indemnity limits of the grant to the Northern Pacific Railroad Company," this Act extends the provisions of the Act of July 1, 1898, No. 14, to settlers whose claims originated while the Railroad Company's selections were pending. It is therefore subject to the same comments as No. 14.

17. *Act of April 28, 1904, c. 1782, 33 Stat. 538 (App. 119).*—This Act legalizes and validates conveyances by the company of parts of its right of way. It waived nothing and acquiesced in nothing.

18. *Act of March 3, 1905, c. 1449, 33 Stat. 1014 (App. 120).*—This Act validates conveyances heretofore made by the company of parts of its right of way in the City of Spokane, Washington.

19. *Act of May 17, 1906, c. 2470, 34 Stat. 197 (App. 121).*—This Act extends the provisions of the Acts of July 1, 1898, No. 14, and March 2, 1901, No. 16, to bona fide settlements or entries made subsequent to January 1, 1898, and prior to May 31, 1905, "in accordance with the erroneous decision of the Land Department respecting the withdrawal on general route of the Northern Pacific Railroad between Wallula, Washington, and Portland, Oregon, where the same has not since been abandoned." This Act was merely a recognition of the effect of the decision in *United States* v. *North-*

ern Pacific R. R. Co., 193 U. S. 1, which pointed out that the Wallula-Portland line not only had not been constructed, but was never even located. The act contains no waiver of the right of the United States to assert that the failure to construct the road terminated the company's claim for the withdrawn indemnity lands, or to set up the company's defaults as a defense to the company's claim.

20. *Act of June 25, 1910, c. 384, 36 Stat. 703, 739 (App. 123).*—This was a general appropriation act which contained an item "not exceeding Thirty Thousand Dollars to enable the Commissioner of the General Land Office to complete the examination and classification of lands within the limits of the Northern Pacific grant under the Act of July second, eighteen hundred and sixty-four, as provided in the Act of February twenty-sixth, eighteen hundred ninety-five, such examination and classification when approved by the Secretary of the Interior to have the same force and effect as a classification by the Mineral Land Commissioners provided for in said Act of February twenty-sixth, eighteen hundred and ninety-five." There is nothing in the Act which constitutes a waiver of the noncompletion of the whole road or a waiver of or acquiescence in any of the company's defaults. To the contrary, it brings forward the provisions of the Mineral Classification Act of February 26, 1895, No. 10, wherein Congress expressly disclaimed any waiver.

21, 22, 23, 24, 25, 26. *Act of March 4, 1911, c. 240, 36 Stat. 1289, 1307 (App. 125); Act of August 26, 1912, c. 408, 37 Stat. 595, 609 (App. 127); Act of October 22, 1913, c. 32, 38 Stat. 208, 217 (App.*

128); Act of July 29, 1914, c. 215, 38 Stat. 559, 571 (App. 129); Act of March 4, 1915, c. 147, 38 Stat. 1138, 1148 (App. 130); and Act of September 8, 1916, c. 464, 39 Stat. 801, 817 (App. 131).—Each of these acts contained an appropriation to carry out the mineral classification. They are, therefore, all *in pari materia* with the Mineral Classification Act, No. 10.

27. *Act of February 27, 1917, c. 135, 39 Stat. 946 (App. 132).*—This Act extends the benefits of the provisions of the Act of July 1, 1898, No. 14, to any bona fide settler of unsurveyed lands in odd-numbered sections "within the primary limits of the land grant to the Northern Pacific Railway Company, within the State of Washington." It provides that upon relinquishment by the Company its selection of lieu lands shall be confined to the State of Washington. It was intended for the benefit of settlers. It is *in pari materia* with the basic Act of July 1, 1898, which in strong and unmistakable language disclaims any intention to waive any rights.

28. *Act of April 17, 1917, c. 3, 40 Stat. 2, 18 (App. 133).*—This Act continues an appropriation for the mineral classification. It is similar to Nos. 21–26.

29. *Act of February 28, 1919, c. 72, 40 Stat. 1204 (App. 134).*—This Act permits the Company to relinquish lands within the indemnity limits of the grant and within the former reservations for certain Indians south of the Missouri River in Montana, which may be found in the possession of actual bona fide and qualified settlers under the homestead laws, and to select an equal quantity of

lieu lands from other surveyed public lands in Montana. Its only purpose was to aid settlers.

30, 31, 32, 33. *Act of December 15, 1921, c. 5, 42 Stat. 1573 (App. 135); Act of September 20, 1922, c. 354, 42 Stat. 1710 (App. 136); Act of February 28, 1923, c. 166, 42 Stat. 1782 (App. 137); Act of March 3, 1925, c. 517, 43 Stat. 1594, (App. 142).*—These acts are all for the relief of individual settlers. They waive nothing and acquiesce in nothing.

34. *Act of March 5, 1931, c. 589, 46 Stat. 2162, (App. 155).*—This act grants adjoining lots in the same section in Montana to the Butte Anglers Club of Butte, Montana, and to the company. It was passed after the Act of June 25, 1929, had been passed and while the present suit was pending. Obviously Congress did not intend by it to relinquish rights which it had directed be litigated.

In this long list of Acts, presumably the best for its purpose the Company has been able to find, there is not one that carries an inference of waiver of the condition requiring completion of the whole road or of any rights of the United States growing out of the breach of this condition or any other condition or covenant in the grants. The repeated expressions of an intention to not waive any rights growing out of the Company's defaults, appearing in Acts passed on and between 1884 and 1896, and carried forward by many subsequent acts *in pari materia* therewith, disclaim in the clearest terms the effect which the company attaches to them.

When the facts had become known to Congress, through its own investigation, the Act of June 25, 1929, was passed. In it Congress did what it con-

sidered appropriate to take advantage of all the rights the United States had as a result of the Company's defaults.

Consequently it follows that this array of legislation (1) does not constitute an acceptance of "the railroad and telegraph line built by the Northern Pacific Railroad Company as a compliance with the terms of the Act of July 2, 1864" as pleaded by defendants, and (2) does not constitute an acquiescence in or waiver of any of the rights of the United States growing out of the breaches of the contract on the part of the company which are alleged in the bill.

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